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No. 2371

IN THE

United States Circuit Court of Appeals

NINTH CIRCUIT

CHRISTIAN HERMANN,

Appellant,

vs.

JOHN F. HALL, et al,

Appellees.

Appeal from the District Court of the United
States for the District of Oregon.

TRANSCRIPT OF RECORD.

FILED

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Court of appeals
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vs.

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Appellees.

**Names and Addresses of Attorneys
upon this Appeal:**

For Appellant:

Rob't. J. Upton, Fenton Bldg., Portland, Oregon
St. Raynor & St. Raynor,
Chamber Commerce, Portland, Oregon

For Respondents:

Peck & Peck, Marshfield, Oregon
H. W. Douglas, Marshfield, Oregon

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*In the District Court of the United States for the
District of Oregon.*

Be it remembered, that on the 1 day of March, 1912,
there was duly filed in the District Court of the
United States for the District of Oregon, a Bill
of Complaint, in words and figures as follows,
to wit:

[Bill of Complaint.]

*In the District Court of the United States for the
District of Oregon.*

CHRISTIAN HERRMAN,

Complainant,

vs.

JOHN F. HALL, MARY HALL, his wife, L. D.
SMITH, ROSA M. SMITH, his wife, HENRY
SENGSTACKEN, AGNES R. SENGSTACK-
EN, his wife, Z. T. SIGLIN, J. J. CLINKIN-
BEARD, PHILURA CLINKINBEARD, his
wife, S. C. ROGERS, DELIA M. ROGERS,
his wife, D. L. ROOD, ELLA M. ROOD, his
wife, JAMES T. HALL, ALICE HALL, his
wife, WILLIAM O. CHRISTENSEN, MAT-
TIE CHRISTENSEN, his wife, TITLE
GUARANTEE AND ABSTRACT COM-
PANY, a corporation, trustee, TITLE GUAR-
ANTEE AND ABSTRACT COMPANY, a
corporation, EAST MARSHFIELD LAND
COMPANY, a corporation, EASTSIDE
LAND COMPANY, a corporation, AN-

DREW MASTERS, CHARLES H. CURTIS, ANNA JOHANSEN, JOHN WALL, MARY PENNOCK, ARTHUR B. SANDOHL, W. R. HAINES and LOUISE B. HAINES, HARVEY SMITH, GEORGE CLINKINBEARD, ANNA D. CLINKINBEARD, CHAPMAN L. PENNOCK, ARNE P. HUSBY, A. E. CAVANAUGH, M. A. McLAGGEN and MINNIE McLAGGEN, FIRST TRUST AND SAVINGS BANK OF COOS BAY, a corporation, J. W. VINGARD, MARY A. PETERSON, DORIS L. SENGSTACKEN, VICTOR ALTO, L. GRAYCE GOULD, CORNELIUS WOODRUFF, WILLIAM J. LEATON, JOHN F. BANE, A. W. NEAL, A. R. WELCH, WILLIAM VAUGHN, WILLIAM H. PAYNE, HILDA FREDERICKSON, ELIZABETH SCHIEFFELE, ANTHONY STAMBUCK, GEORGE H. ELLIOT, NELLIE CHANDLER, T. V. JOHNSON, LISI ALTO, J. T. HERRETT,

Defendants.

To the Honorable, the Judges of the District Court of the United States for the District of Oregon:

Your orator, Christian Herrmann, having been born in Germany and being at all times in this bill of complaint mentioned a subject of the German Emperor, brings this his bill of complaint against John F. Hall, Mary Hall, his wife, L. D. Smith, Rosa M. Smith, his wife, Henry Sengstacken, Agnes R. Seng-

stacken, his wife, Z. T. Siglin, J. J. Clinkinbeard, Philura Clinkinbeard, his wife, S. C. Rogers, Delia M. Rogers, his wife, D. L. Rood, Ella M. Rood, his wife, James T. Hall, Alice Hall, his wife, William O. Christensen, Mattie Christensen, his wife, Andrew Masters, Charles H. Curtis, Anna Johansen, John Wall, Mary Pennock, Arthur B. Sandohl, W. R. Haines and Louise B. Haines, Harvey Smith, George Clinkinbeard Anna D. Clinkinbeard, Chapman L. Pennock, Arne P. Husby, A. E. Cavanaugh, M. A. McLaggen and Minnie McLaggen, J. W. Vingard, Mary A. Peterson, Doris L. Sengstacken, Victor Alto, L. Grayce Gould, Cornelius Woodruff, William J. Leaton, John F. Bane, A. W. Neal, A. R. Welch, William Vaughn, William H. Payne, Hilda Frederickson, Elizabeth Schieffele, Anthony Stambuck, George H. Elliott, Nellie Chandler, T. V. Johnson, Lisi Alto and J. T. Herrett, citizens, residents and inhabitants of the State of Oregon, and of said Judicial District of Oregon, and the Title Guarantee and Abstract Company, a corporation, trustee, Title Guarantee and Abstract Company, Eastside Land Company, East Marshfield Land Company, and First Trust and Savings Bank of Coos Bay, corporations organized and existing under and by virtue of the laws of the State of Oregon, having their offices and principal places of business in the City of Marshfield, County of Coos, State of Oregon, and citizens of the State of Oregon and inhabitants of the Judicial District of Oregon, and thereupon your orator, for cause of suit against said

defendants complains and alleges the following facts, to-wit:

I.

That your orator, the complainant, is now and during all the times hereinafter named was a subject of the Emperor of Germany and is now temporarily residing in the City of Portland, County of Multnomah, State of Oregon.

II.

That said defendant Title Guarantee and Abstract Company, both in its individual capacity and as trustee, the Eastside Land Company and East Marshfield Land Company are, and at all times hereinafter mentioned were, each and all separate and distinct corporations duly organized, incorporated and existing under and by virtue of the laws of the State of Oregon, and citizens of and domiciled in said State of Oregon, each having its head offices and place of business in Marshfield in the Judicial District and State of Oregon; that defendants John F. Hall, James T. Hall, L. D. Smith, J. J. Clinkinbeard, D. L. Rood, Henry Sengstacken, S. C. Rogers and Z. T. Siglin and each of them are now, and have been at all times hereinafter mentioned, citizens and inhabitants of and domiciled in the City of Marshfield, County of Coos and State and Judicial District of Oregon.

III.

That the above named defendants and each and every of said defendants, during all of the times mentioned in this bill of complaint, have been and now

are citizens and inhabitants of the State of Oregon.

IV.

That the matter in dispute in this suit involves title to real estate and, exclusive of interest and costs, exceeds the sum of \$3,000.00.

V.

That heretofore, on and prior to the 18th day of September, A. D. 1905, Dora Herrmann was the owner of and entitled to the possession of the following described real estate, to-wit: The Northeast Quarter and Lot Two (2) and the West Half of the Southeast Quarter of Section Thirty-six (36) Township Twenty-five (25) South of Range Thirteen (13) West of the Willamette Meridian, Coos County, State of Oregon.

VI.

That from and after the 8th day of June, 1902, and until the 18th day of September, 1905, the said Dora Herrmann and your orator were husband and wife and resided in the Empire of Germany; that your orator was at all the times in this bill of complaint mentioned unacquainted with the English language, being a native of said Empire of Germany, and totally unacquainted with the customs, laws and conditions of the United States of America, and knew nothing of the value of the property above described, never having been in the United States of America until the time hereinafter stated, and particularly never having been within many thousand miles of the said described property; that your orator's wife, the said

Dora Herrmann, being far removed from said described property, and being unable to give to it her personal attention, and having and reposing great confidence in the honesty, reputation, integrity, fidelity and ability of the defendant John F. Hall, who then and there and at all times herein mentioned resided in close proximity to said property and was at all times acquainted with the same and with the value thereof, employed said defendant John F. Hall as her legal and confidential adviser and agent on the 7th day of November, A. D. 1903, and made, executed and delivered to said defendant her power of attorney in writing, therein and thereby appointing said Hall her true and lawful attorney in fact, empowering him, among other things, to sell and dispose of her, the said Dora Herrmann's, property in said county; that as the husband of the said Dora Herrmann and not otherwise your orator joined in the execution of said power of attorney; that immediately on the execution and delivery of said power of attorney by the said Dora Herrmann and your orator, the said John F. Hall accepted the said appointment and thereupon became and continued to be and act as the attorney in fact and legal and confidential adviser and agent of the said Dora Herrmann until her decease as hereinafter stated; that at all said times said defendant John F. Hall was and ever since has been and now is an attorney at law, duly admitted to practice as such in all of the courts of the State of Oregon and the District Court of the United States for the Dis-

trict of Oregon, and held himself out to be such attorney at law engaged in active practice in said County of Coos; that a copy of said power of attorney, marked Exhibit "A," is hereto annexed and made a part of this bill of complaint, word for word, the same as if fully set out herein.

VII.

That on the 18th day of September, A. D. 1905, said Dora Herrmann died intestate in Germany, leaving your orator as her only heir at law, and thereupon your orator became and was the owner and entitled to all the property, real and personal, of which said Dora Herrmann died seized, and all rights which she had in said property, and particularly in the above described property.

VIII.

That at all times in this bill of complaint mentioned the defendant the Title Guarantee and Abstract Company was and is engaged in the business of preparing abstracts of title to real estate in said County of Coos; that the officers of said corporation were, and at all times have been, and are familiar with the property described in Paragraph V, and with the value thereof; that the manager is and at all times herein stated was the defendant Henry Sengstacken, and your orator is informed and believes and alleges the fact to be that said defendant John F. Hall is a stockholder of said corporation.

IX.

Your orator further represents and alleges that dur-

ing the month of August, 1905, while the said Dora Herrmann was lying sick in her last illness, in her home in Germany, and totally unable to transact any business, and in a weakened mental and physical condition so that she had not sufficient strength and intelligence to understand or attend to her affairs, said defendants John F. Hall, L. D. Smith, J. J. Clinkinbeard, D. L. Rood, Henry Sengstacken, James T. Hall, Z. T. Siglin, and S. C. Rogers, confederating and conspiring together and with the said defendant Title Guarantee and Abstract Company, for the purpose of cheating and defrauding the said Dora Herrmann and depriving her of said property and acquiring the same for themselves for a grossly inadequate price, and taking advantage of the ignorance of the said Dora Herrmann, of the condition and value of said property and the faith and confidence reposed in said defendant John F. Hall by said Dora Herrmann as her attorney in fact and legal and confidential adviser and agent, and of his intimate knowledge of her affairs, said defendants and each of them, well knowing the value of said described property and the confidential relation which said defendant John F. Hall bore to the said Dora Herrmann as her attorney in fact and legal and confidential adviser, fraudulently, treacherously, corruptly, and wrongfully devised and concocted the wicked, fraudulent and corrupt plan and scheme, with intent to cheat, wrong and defraud the said Dora Herrmann and your orator out of said property and obtain the same for a grossly in-

adequate sum and value, as follows, to-wit: That the said defendant Hall should sell, as said attorney in fact, the whole of said property described in Paragraph V of this bill of complaint to the said defendants John F. Hall, L. D. Smith, J. J. Clinkinbeard, D. L. Rood, Henry Sengstacken, S. C. Rogers, James T. Hall and Z. T. Siglin, and for the purpose of covering up, concealing and hiding his own connection with and interest in said transaction, and to deceive said Dora Herrmann and your orator as to the real facts in connection therewith, it was further agreed by and between said defendants that the said defendant John F. Hall should convey said described property by deed to the defendant Title Guarantee and Abstract Company, trustee, and sign the names of the said Dora Herrmann and your orator thereto by their attorney in fact, the defendant John F. Hall; that the purchase price to be named in said deed was the sum of \$4,400.00, and it was further agreed by and between said defendants that the said defendant John F. Hall was to report and represent to said Dora Herrmann and your orator that said sum of \$4,400.00 was all that said property was reasonably worth, and that the same was the full consideration that he was receiving therefor; that in truth and in fact the said defendants John F. Hall, L. D. Smith, J. J. Clinkinbeard, D. L. Rood, Henry Sengstacken, James T. Hall, Z. T. Siglin and S. C. Rogers were not to pay for said land more than \$2,200.00, said payment to be made as follows: Said defendants John F. Hall

and James T. Hall were to pay \$366.66 for a two-twelfths interest therein; said defendant L. D. Smith was to pay \$549.99 for a three-twelfths interest therein; said defendant J. J. Clinkinbeard was to pay \$366.66 for a two-twelfths interest therein; said defendant D. L. Rood was to pay \$183.33 for a one-twelfth interest therein; said Henry Sengstacken was to pay \$549.99 for a three-twelfths interest therein; and said S. C. Rogers was to pay \$183.33 for a one-twelfth interest therein; and said defendants were to share in said property, each in the proportion in which said payments above set out were to be made, and that said defendant Title Guarantee and Abstract Company was to issue to each of said defendants a trust certificate or memorandum signed by said defendant Title Guarantee and Abstract Company, certifying their interests as herein alleged.

X.

That pursuant to said plan and scheme so concocted and contrived by said defendants, and with the intent to cheat, wrong and defraud said Dora Herrmann and your orator out of said property and obtain the same for a grossly inadequate sum and value, said defendant John F. Hall, without the knowledge of the said Dora Herrmann or your orator, did thereafter, on the 30th day of August, 1905, make, execute and deliver to said defendant Title Guarantee and Abstract Company, trustee, a pretended deed of conveyance, and signed the names of said Dora Herrman and your orator thereto by John F. Hall, attorney

in fact, thereby purporting and pretending to convey to said defendant Title Guarantee and Abstract Company all the above described real estate, a copy of which said deed is hereto attached, marked Exhibit "B" and hereby made a part of this bill of complaint, word for word, the same as if fully set out herein; that said deed was so made and executed as to entitled the same to be recorded, and the same was thereafter recorded on the first day of September, 1905, on pages 336-7 of Book 41 of Records of Deeds in the office of the County Clerk and Recorder of Conveyances of the County of Coos, State of Oregon; that all of the aforesaid defendants except the defendant John F. Hall and said James T. Hall paid to said defendant John F. Hall each his proportion of said \$2,200.00, but said John F. Hall, with the knowledge and consent of all of his said hereinbefore mentioned conspirators, paid nothing for his interest in said land, but in or about the month of September, 1905, said defendant John F. Hall sent a written statement to the said Dora Herrmann in Germany, which was received by your orator after her death, falsely representing and reporting that he had sold said property to the defendant Title Guarantee and Abstract Company and had received for it the sum of \$2200.00 and a purchase money mortgage in the sum of \$2200.00 from said defendant Title Guarantee and Abstract Company as security for the payment of the remainder of said pretended purchase price of \$4,400.00; that at said time the said defendant John F. Hall also sent, directed to said Dora Herr-

man, the sum of \$1,694.00, retaining and claiming the sum of \$506.00 from said alleged cash payment as his commissions and attorney's fees for selling said property, drawing said pretended deed, and doing whatever other legal work was incident to said pretended transfer, whereas in truth and in fact the said John F. Hall had assumed and pretended to sell said property to the said Title Guarantee and Abstract Company for the said Dora Herrmann and your orator, but concealed from your orator and said Dora Herrmann that the sale was for himself and the other defendants aforesaid for said grossly inadequate sum and value, and under an understanding and agreement between them and the said Title Guarantee and Abstract Company that he and said defendants were to acquire and retain said respective interests therein; that immediately on the execution of said pretended deed and the transmission of said several sums by the aforesaid defendant, John F. Hall, and in pursuance of said plan and scheme and intent, said defendant Title Guarantee and Abstract Company made and issued its pretended trust certificates or memoranda as aforesaid to each and every of said defendants for his pretended interest in said property and trust as hereinbefore alleged to have been agreed upon by and between said defendants, including a certificate to said John F. Hall and James T. Hall for a two-twelfths interest thereof, said James T. Hall being a brother of said John F. Hall, and said defendants and each of them accepted said certificates so issued to him as

evidence of his interest in said trust, and your orator, on information and belief, alleges the fact to be that each of said defendants is now the holder of said certificate so issued to him, and that each of them claims the interest in said property indicated and shown by such certificate held by him; that the defendant John F. Hall, with the knowledge and consent of the aforesaid defendants, who at all times knew the confidential relations existing between the said defendant John F. Hall and the said Dora Herrmann and your orator, and that he was their attorney in fact and legal and confidential adviser, failed and neglected to report to said Dora Herrmann or to your orator that he had sold the said property to said defendants, or that he or his brother James T. Hall had reserved and acquired, as aforesaid, an interest in said property, but fraudulently, wickedly, corruptly and with the intent to deceive, cheat and defraud the said Dora Herrmann and your orator, suppressed and concealed said facts and falsely represented that said property was of no greater value than \$4,400.00, and that he had sold the same in good faith for that amount to the said Title Guarantee and Abstract Company.

XI.

Your orator further represents and alleges that on or about the 23d day of December, 1907, the defendant the East Marshfield Land Company, well knowing all the facts hereinbefore set forth, entered into an agreement with said defendant Title Guarantee and Abstract Company, of the nature of which your

orator is not informed, and that in pursuance of said agreement and in compliance with the terms thereof said Title Guarantee and Abstract Company, for itself and as trustee, wrongfully, fraudulently and corruptly, and with intent to cheat, wrong and defraud your orator of said property, attempted to transfer a portion of said hereinbefore described property to the defendant East Marshfield Land Company, to-wit, all of that portion of Lot Two (2) and the Northeast Quarter of Section Thirty-six (36) in Township Twenty-five (25) South of Range Thirteen (13) West of the Willamette Meridian, covered by the pretended plat of the townsite of East Marshfield on file and of record in the County Clerk's office of Coos County, Oregon, and more particularly all of that portion of Blocks 38, 39, 56, 55, 54, 53 and 52 thereof which overlap and are located by said pretended plat upon said Northeast Quarter and on said Lot 2, and thereupon made, executed and delivered to said defendant East Marshfield Land Company a pretended deed of conveyance thereof, which deed was so made and dated on the 23d day of December, 1907, and recorded in the office of the County Clerk of the County of Coos, December 24th, A. D. 1907, Volume 49, on page 168 thereof, of the Records of Deeds of Coos County, Oregon, and a copy of said deed is hereto attached, marked Exhibit "C" and made a part hereof as fully as if the same were set forth word for word in this place; that said defendant East Marshfield Land Company accepted said pretended deed at said time,

and has ever since and now wrongfully and in violation of the right of your orator to the title and possession of said described property, has claimed and still claims the ownership and holds the possession thereof; that said defendant East Marshfield Land Company ha no right or title in said premises and said deed so made as aforesaid is void and a cloud upon the title of your orator in said premises.

XIa.

Your orator further represents and alleges that on or about the 22d day of July, 1911, the defendant Eastside Land Company, well knowing all the facts hereinbefore in this bill of complaint set forth, entered into an agreement with said defendant Title Guarantee and Abstract Company, Trustee, of the particular nature of which your orator is not informed, and that in pursuance of said agreement and in compliance with the terms thereof said defendant Title Guarantee and Abstract Company, for itself and as trustee, wrongfully, fraudulently and corruptly, and with intent to cheat, wrong and defraud your orator of said property, attempted to transfer all of said lands hereinbefore described in this bill of complaint to said defendant Eastside Land Company, excepting such portions as said defendant Title Guarantee and Abstract Company, Trustee, had theretofore attempted to convey or contracted to convey to other parties, and thereupon, and in pursuance of said agreement, made, executed and delivered to said defendant the Eastside Land Company a pretended deed of conveyance there-

of, which said deed was so made and executed on the 22d day of July, 1911, as to entitle the same to be recorded, and the same was thereafter recorded in the office of the County Clerk of the said County of Coos on the 26th day of July, 1911, in Deed Book 60, page 349, of the Records of Deeds of Coos County, Oregon; that said defendant Eastside Land Company accepted said pretended deed at said time and has ever since and now, wrongfully and in violation of the rights of your orator to the title and possession of said described property, claimed and still claims the ownership and holds possession thereof; that said defendant Eastside Land Company has no right or title in said premises and said deed so made as aforesaid is void and a cloud upon the title of your orator in said premises; that the officers and all of the stockholders of said defendant Eastside Land Company were cestui qui trustent under and in the pretended trust attempted to be created under and in the pretended deed of conveyance of said property by the defendant John F. Hall, to the defendant Title Guarantee and Abstract Company, Trustee, described in Paragraph X of this bill of complaint, and said conveyance was without consideration to the Title Guarantee and Abstract Company, Trustee, or any consideration except certain shares of its capital stock issued and delivered to the aforesaid cestui qui trustent.

XII.

Your orator further represents and alleges that all of the said defendants, during all of the times herein

mentioned, resided and now reside in the close vicinity of said described property, and were at all times intimately acquainted with one another, with said defendant John F. Hall, with said land and its value, and well knew that said sum of \$4,400.00 was and is a grossly inadequate consideration and price for said land; that said land is located in close proximity to the growing city of Marshfield, Oregon, and abuts on the deep water of the harbor of Coos Bay, and said defendants and each of them well knew that said land was, at the time of said pretended sale, reasonably worth the sum of \$150.00 per acre; that when said transfer had been so effected in the manner hereinbefore set forth, and immediately thereafter, the defendant Title Guarante and Abstract Company, assuming to act as and claiming to be the trustee for the aforesaid defendants, and at the instance and request and by the direction of said defendants, caused a portion of said land to be platted into pretended lots and blocks for townsite purposes, and thereafter sold a large number of lots from the platted portion thereof for a large amount of money, but for what precise amount, and what was paid to and received by said trustee therefor, is unknown to your orator; he is therefore unable to state the amount, but the number of lots sold, the purchase price thereof, and the sum or sums paid to said defendant trustee therefor is well known to the defendants and to each of them, but your orator is informed and believes and alleges the fact to be that the defendant Title Guarantee and Ab-

stract Company has realized from the sale of lots out of the portion of said land so platted a sum sufficient to pay said pretended purchase money mortgage, and that the same was thereafter paid and discharged out of the moneys received from the sale of such lots and to reimburse the aforesaid defendants for the respective amounts paid by them on the alleged purchase price of said land as alleged in Paragraph IX of this bill of complaint, and that said defendants have been so reimbursed out of such funds by the said defendant Title Guarantee and Abstract Company, and that a considerable sum of money in excess of said amounts has been realized by said defendants from the said lots.

XIII.

Your orator further alleges and represents that immediately after the decease of said Dora Herrmann, said John F. Hall was duly appointed, on the 27th day of November, 1905, administrator of the estate of said Dora Herrmann, and qualified as such administrator on the same day, and acted as such administrator up to the time of his discharge from said office on the 12th day of December, 1906; that your orator, being totally unacquainted with said land, its value, the English language, the laws and customs of the United States, and of any and all of the conditions in said Coos County, Oregon, and particularly in connection with said property, and reposing implicit confidence and faith in and relying on the fidelity, good faith and honesty of said defendant John F. Hall,

signed said power of attorney hereinbefore mentioned, and upon the death of said Dora Herrmann as aforesaid your orator employed the said defendant John F. Hall as his legal and confidential adviser and agent to attend to your orator's affairs and business in connection with the estate and property of said Dora Herrmann in said Coos County, and your orator relied on said defendant John F. Hall implicitly and fully with reference thereto; that said defendant John F. Hall failed and neglected, with the knowledge and consent and connivance of the aforesaid other defendants herein to inform or advise your orator of any of the facts hereinbefore set forth, and has at all times wrongfully concealed the same, and the defendants and each of them have at all times wrongfully concealed and suppressed all of said facts from your orator, and failed to inform and refrained from informing him of said facts, so as to prevent him from learning the same.

XIV.

Your orator further represents and alleges that he left the Empire of Germany and came to sojourn in America about the first day of April, A. D. 1909, and that soon after his arrival in the United States he went to the City of Marshfield in said Coos County, at which time he found that said defendant John F. Hall had been elected and was then the duly qualified and acting county judge of said county, and confiding and relying on the reputation of said defendant John F. Hall, and by reason of the confidential rela-

tions of the said defendant John F. Hall theretofore as the legal and confidential agent and adviser of your orator, and being unable, because of ignorance of the language, laws and customs of the United States, to communicate with the inhabitants in and about said City of Marshfield, and having no notice or knowledge of the facts hereinbefore set forth, and having no suspicion of the same, your orator did not discover any of said facts until about the month of May of the year 1911; that on or about the first of May of the year 1911 your orator learned by accident of the location of said land and that he had been deceived by said defendant John F. Hall as to its true value and as to the pretended purchasers thereof as hereinbefore set forth, and that said land was in truth and in fact of great value as hereinbefore set forth and alleged, and thereupon your orator, in or about the month of May, as aforesaid, made a demand on said defendant John F. Hall for an accounting and an explanation, but said defendant John F. Hall failed and refused and still refuses to account to your orator for said land or to make any explanation concerning said transaction whatever.

XV.

Your orator further alleges the fact to be, on information and belief, that Z. T. Siglin, S. C. Rogers and William O. Christensen, defendants above named, prior to the 30th day of June, A. D. 1911, but at what precise time your orator is unable to say, pretended and claimed to have purchased an interest in all of the

land described in Paragraph V of this bill of complaint, but the precise nature of said interest is unknown to your orator; that ever since said last named date said defendant Siglin has claimed and still claims said interest in said land, and on the 30th day of June, A. D. 1911, said defendants L. D. Smith, Henry Sengstacken and Z. T. Siglin made, executed and delivered to the defendant Eastside Land Company a pretended quitclaim deed and therein and thereby assumed and pretended to convey whatever interest they and each of them claimed to have in the following described property, to-wit: The Northeast Quarter and Lot Two (2) and the West Half of the Southeast Quarter of Section Thirty-six (36) in Township Twenty-five (25) South of Range Thirteen (13) West of the Willamette Meridian, excepting such portions of officially recorded plats of Eastside and Home Addition to Eastside, Coos County, Oregon, as were previously deeded or contracted by Title Guarantee and Abstract Company, trustee, one of the defendants aforesaid, and also excepting that part of the Northeast Quarter and Lot Two (2) of Section Thirty-six (36) in Township Twenty-five (25) South of Range Thirteen (13) West of the Willamette Meridian contained in Blocks 38, 39, 52, 53, 54, 55 and 56, of the town site of East Marshfield, as per plat and dedication thereof on file and of record in the office of the County Clerk of said Coos County, and purported to be conveyed also by said pretended quitclaim deed Lots Ten (10) and Eleven (11) in Section Thirty-one (31) of Township

Twenty-five (25), South of Range Twelve (12) West of the Willamette Meridian, to said defendant Eastside Land Company; that said conveyance was so made by said parties with the intent and purpose and with full knowledge of all of the facts set forth and contained in this bill of complaint, wrongfully and corruptly to deprive this complainant and defraud him of his right, title and interest in and to all of said described property and to cloud the title thereof, and said Eastside Land Company has ever since said pretended transfer claimed and now claims title to the premises described in said last mentioned quitclaim deed as against your complainant, and said deed is a cloud upon this complainant's title to said premises; that a copy of said quitclaim deed is hereto attached, marked Exhibit "D" and made a part of this bill of complaint, the same as if fully set forth, word for word, in this place.

XVI.

That on July 1, 1911, the defendants J. J. Clinkinbeard, Philura Clinkinbeard, S. C. Rogers, Delia M. Rogers, D. L. Rood, Ella M. Rood, James T. Hall, Alice Hall, John F. Hall, Mary Hall, William O. Christensen and Mattie Christensen, in further pursuance of said fraudulent scheme, collusion and conspiracy to cheat, wrong and defraud said Dora Herrmann and your orator of said property, executed and delivered to the defendant Eastside Land Company a pretended quitclaim deed and declaration of trust, a copy of which is hereto attached, marked Exhibit "E"

and is hereby made a part of this bill of complaint as fully as if the same were set forth in this place word for word; that on the 24th day of July, 1911, the said Eastside Land Company caused said pretended deed to be recorded in Book 60 at page 341 of Deeds in the County Clerk's office of Coos County, Oregon, and from and since said time wrongfully claims to be the owner of the property therein described; that the said pretended deed and declaration of trust was made, executed, delivered and recorded, as aforesaid, by the persons named therein as pretended grantors and the pretended grantee, said Eastside Land Company, with full knowledge and notice of each and every of said persons of all of the facts set forth and contained in this bill of complaint, and with the intent and purpose to cheat, wrong and defraud your orator of said property and of his right, title, interest and estate therein, and they have thereby cast a cloud upon his title in and to the same.

XVII.

That from and since the said 30th day of August, 1905, the defendant Title Guarantee and Abstract Company has executed and delivered certain deeds, and has thereby pretended to convey and transfer to the defendants, Henry Sengstacken, Andrew Masters, Charles H. Curtis, Z. T. Siglin, Anna Johansen, S. C. Rogers, John Wall, Mary Pennock, Arthur B. Sandohl, W. R. Haines and Louise B. Haines, Harvey Smith, George Clinkinbeard, Anna D. Clinkinbeard, Chapman L. Pennock, Arne P. Husby, A. E. Cav-

anaugh, M. A. McLaggen and Minnie McLaggen, First Trust and Savings Bank of Coos Bay, a corporation, J. W. Vingard, Mary A. Peterson, Doris L. Sengstacken, Victor Alto, L. Grayce Gould, Cornelius Woodruff, William J. Leaton, John F. Bane, A. W. Neal, A. R. Welch, William Vaughn, William H. Payne, Hilda Fredericksen, Elizabeth Schieffele, Anthony Stambuck, George H. Elliot, Nellie Chandler, T. V. Johnson, Lisi Alto, and J. T. Herrett, divers parts and parcels of the lands hereinbefore set forth and described, and said defendants now wrongfully claim and pretend to be the owners of the same, and have caused said pretended deeds to be recorded in the deed records in the office of the County Clerk of Coos County, Oregon, and claim to be the owners of the same; that said deeds and each and every of them were given by said Title Guarantee and Abstract Company and received by said defendants and each and every of said defendants with full notice and knowledge of all of the facts hereinbefore set forth in this bill of complaint, and of your orator's rights and title in and his ownership of all of said lands hereinbefore set forth, and said pretended deeds and claims of said defendants are against the rights of your orator in and to said lands and have created clouds upon your orator's title to said premises.

XVIII.

That from and since said 30th day of August, 1905, the defendant Title Guarantee and Abstract Company has collected and received, since it has been in pos-

session of said premises, from the rents, timber and profits thereof, divers sums of money, the amount of which your orator has not sufficient information or knowledge to form a belief from which to set forth and allege herein, but which your orator is informed and believes, and therefore alleges the fact to be, aggregates several thousand dollars, and a sum greatly in excess of the pretended purchase price of \$4400.00 aforesaid for which the defendant John F. Hall pretended to sell the said premises to the defendant Title Guarantee and Abstract Company, trustee for the defendants hereinbefore set forth; that on the day of January, 1912, your orator requested and demanded of the defendant Title Guarantee and Abstract Company an accounting of all the rents, issues, timber and profits of said premises received by it since said 30th day of August, 1905; that on said day your orator also applied to said defendant and offered in writing to pay it the sum of \$4400.00 with interest thereon at the rate of six per cent per annum from the 30th day of August, 1905, and requested it to execute and deliver a good and sufficient deed to said premises to your orator; that the said defendant refused to account to your orator for said rents, timber, issues and profits, to accept said offer and tender of said sum of \$4400.00 and interest aforesaid, and refused to execute and deliver to your orator said deed to said premises.

XIX.

That during the month of January, 1912, your ora-

tor applied to and demanded of each and every of the defendants that could be located and found by your orator, that they execute and deliver to your orator a deed sufficient in form to release and quitclaim to your orator any and all claims, interest and estate they and each of them set up and claim to be the owners of in and to said premises by virtue of any deed or other instrument deraigned from, by, through, or executed to them or either of them under the pretended deed aforesaid from the defendant John F. Hall to the defendant Title Guarantee and Abstract Company, but the said defendants and each of them refused to execute such deeds or any of such deeds and deliver the same to your orator; that your orator was unable to apply and make demand for conveyance of said property as herein alleged on defendants Arthur B. Sandohl, Anna Johansen, Arne P. Husby, Mary A. Peterson, Doris L. Sengstacken, L. Grayce Gould, Cornelius Woodruff, A. R. Welch and J. T. Herrett, for the reason that your orator, after due diligence and search, could not find nor locate said above named defendants within the State of Oregon or elsewhere for the purpose of making demand upon them.

XX.

That the defendants, Philura Clinkinbeard, Delia M. Rogers, Ella M. Rood, Alice Hall, Mary Hall, Mattie Christensen, Rosa M. Smith, and Agnes R. Sengstacken, are the wives respectively of the defendants J. J. Clinkinbeard, S. C. Rogers, D. L. Rood, James T.

Hall, John F. Hall, William O. Christensen, L. D. Smith, and Henry Sengstacken, and in virtue thereof claim some dower or other right in and to the promises hereinbefore described, but that said claims and each and every of them are wrongfully made and against the rights hereinbefore alleged of your orator.

XXI.

That your orator has no plain, speedy or adequate remedy at law in the premises.

XXII.

That unless restrained by this honorable court said defendants will encumber or further cloud the title of said described lands by mortgaging or transferring the same to another or other parties.

WHEREFORE, your orator prays that he have decree of this court as follows, to-wit:

1. That each and every of the defendants be required to set up and show what is the nature and extent of the claim, interest or estate they and each of them assert or claim to be the owners of, in or to said premises; that said claims be decreed to be wrongful and against the rights of your orator therein, and that the clouds created thereby be removed from the title of your orator in said premises, and your orator's title be quieted and confirmed in and to the same.

2 That the said defendants John F. Hall, L. D. Smith, J. J. Clinkinbeard, D. L. Rood, Henry Sengstacken, S. C. Rogers, Title Guarantee and Abstract Company, a corporation, trustee, Title Guarantee and Abstract Company, a corporation, Eastside Land

Company, a corporation, East Marshfield Land Company, a corporation, Z. T. Siglin, James T. Hall and William O. Christensen, have no right, title or interest in or to the premises described in the bill of complaint by reason of the deed, deeds and instruments in writing, copies of which are attached to the bill of complaint and marked respectively Exhibits "A," "B," "C," "D" and "E," or by any other reason whatsoever, and that each and every of said deeds and pretended deeds be canceled, annulled, and declared to be void and of no effect.

3. That each and every of the other defendants be decreed to have no right, title, interest or estate in or to said premises or to any part thereof, and that any and all deeds under which they claim, together with all their claims to said premises, be declared void, canceled, and your orator's title therein be forever quieted and confirmed.

4. That the complainant, Christian Herrmann, is entitled to the possession of the premises described in Paragraph V of this bill of complaint, and is the legal owner thereof in fee simple absolute, and that the defendants John F. Hall, L. D. Smith, J. J. Clinkinbeard, D. L. Rood, Henry Sengstacken, S. C. Rogers, Title Guarantee and Abstract Company, a corporation, trustee, Title Guarantee and Abstract Company, a corporation, Eastside Land Company, a corporation, East Marshfield Land Company, a corporation, Z. T. Siglin, James T. Hall and William O. Christensen and each of them be required to surrender the possession

of said premises and the whole thereof to the complainant.

5. That the defendants John F. Hall, L. D. Smith, J. J. Clinkinbeard, D. L. Rood, Henry Sengstacken, S. C. Rogers, Title Guarantee and Abstract Company, a corporation, trustee, Title Guarantee and Abstract Company, a corporation, Eastside Land Company, a corporation, East Marshfield Land Company, a corporation, Z. T. Siglin, James T. Hall and William O. Christensen, be required to account for the rents, issues and profits of said premises since the 31st day of August, 1905, to the present time, and that the complainant have judgment against said defendants and each of them of whatever amount the court shall find upon said accounting shall be justly due this complainant for such rents, issues and profits, less the sum of \$1694.00 and interest thereon at the rate of six per cent per annum from the 30th day of August, 1905; and the sum of \$2200.00 and interest thereon at the rate of six per cent per annum from the 30th day of August, 1905, represented by the pretended purchase price note and mortgage executed by said Title Guarantee and Abstract Company, Trustee, to Dora Herrman as hereinbefore set forth, heretofore accounted for to the estate of said Dora Herrmann, deceased, as the pretended consideration for the pretended sale of said land by said defendant John F. Hall to said defendant Title Guarantee and Abstract Company, a corporation, trustee.

6. That the said defendants be required to make,

according to the best and utmost of their knowledge, remembrance, information and belief, a true, full, direct and perfect answer (not, however, under oath, which is hereby expressly waived) to all the matters and things hereinbefore set forth and charged, the same as if specifically interrogated as to each; that writs of subpoena ad respondendum issue directly to said defendants and each of them, commanding them and each of them to appear and answer unto this bill of complaint on a day certain therein to be named, and to abide and perform such judgment order and decree in the premises as to the court may seem meet and as may be required by the principles of equity and good conscience.

7. That a writ of injunction may be issued from and under the seal of this court perpetually enjoining and restraining said defendants John F. Hall, L. D. Smith, J. J. Clinkinbeard, D. L. Rood, Henry Sengstacken, S. C. Rogers, Title Guarantee and Abstract Company, a corporation, trustee, Title Guarantee and Abstract Company, a corporation, Eastside Land Company, a corporation, East Marshfield Land Company, a corporation, Z. T. Siglin, James T. Hall and William O. Christensen, from in any way conveying, transferring or mortgaging or otherwise encumbering the premises described in this bill of complaint.

8. That this complainant have judgment for his costs and disbursements, and for a reasonable attorney's fee herein, and that he have such other and

further relief as to the court may seem just and equitable in the premises.

CHRISTIAN HERRMANN,
Complainant.

HENRY ST. RAYNOR,
CHARLES I. REIGARD and
McALLISTER & UPTON,
Attorneys for Complainant.

EXHIBIT "A."

KNOW ALL MEN BY THESE PRESENTS,
That Dora Herrmann and Christian Herrmann, her husband, have made, constituted and appointed, and by these presents do make, constitute and appoint John F. Hall of Marshfield, Coos County, Oregon, their true and lawful attorney for them and in their name place and stead, and for their use and benefit to ask, demand, sue for, recover, collect and receive all sums of money, debts, rents, dues, accounts, legacies, bequests, interests, dividends, annuities and demands whatsoever, as are now or shall hereafter become due, owing, payable or belonging to them and have, use and take all lawful means in their names or otherwise for the recovery thereof, by attachments, arrests, distress or otherwise, and to compromise and agree for the same, and acquittances or other sufficient discharges for the same for them and in their names to make, seal and deliver; to bargain, contract, agree for, purchase, receive and take lands, tenements, hereditaments, and accept the seizen and possession

of all lands and all deeds and other assurances in the law therefor, and to lease, let, demise, bargain, sell, remise, release, convey, mortgage, and hypothecate lands, tenements and hereditaments, upon such terms and conditions and under such covenants as he shall think fit. Also to bargain and agree for, buy, sell, mortgage, hypothecate and in any way and every way and manner deal in and with goods, wares and merchandise choses in action, and other property in possession or in action, and to make, do and transact all and every kind of business of what nature or kind soever; and also for them and in their names and as their act and deed, to sign, seal, execute, deliver and acknowledge such deeds, covenants, indentures, agreements, mortgages, hypothecation, bottomries, charter parties, bills of lading, bills, bonds, notes, receipts, evidences of debts, releases and satisfaction of mortgages, judgments and other debts, and other instruments in writing of whatever kind and nature.

GIVING AND GRANTING unto to our said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes as they might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that our said attorney or his substitute or substitutes shall lawfully do or cause to be done by virtue of these presents.

IN WITNESS WHEREOF, We have hereunto

set our hands and seals the 7th day of November,
1903.

DORA HERRMANN, (SEAL)

CHRISTIAN HERRMANN. (SEAL)

Signed, Sealed and Delivered

in the presence of

ANNA INGGAL, JERRIMINN GODUTEN.

Empire of Germany,

City of Hanover.—ss.

On this, the 7th day of November A. D. 1903, personally came before me, a U. S. Vice Consul in and for said City, the within named Dora Herrmann and Christian Herrmann, her husband, to me personally known to be the identical persons described in and who executed the within instrument, and who each personally acquowledged to me that they executed the same freely and voluntarily for the uses and purposes therein named.

WITNESS my hand and seal this 7th day of November A. D. 1903.

(Seal)

H. HALL HALE,

Vice and Deputy Consul.

Recorded August 15, 1905.

James Watson, County Clerk.

EXHIBIT "B."

KNOW ALL MEN BY THESE PRESENTS,
That Dora Herrmann and Christian Herrmann, her husband, for and in consideration of the sum of Four Thousand Four Hundred Dollars to them in hand

paid by Title Guarantee and Abstract Company, a corporation trustee, of Marshfield, Coos County, Oregon, have bargained and sold and by these presents do grant, bargain, sell and convey unto said Title Guarantee and Abstract Company, a corporation, trustee, and to its successors and assigns, all the following described real property situate in the County of Coos, in the State of Oregon, to-wit:

The northeast quarter and lot (2) two, and the west half of the southeast quarter of section 36 in Township 25 South of Range 13 West of Willamette Meridian. Also all mines, veins, seams and beds of coal and other minerals whatsoever found or which may be found upon or under the land described as lot number three in section 36 in Township 25 South of Range 13 West of Willamette Meridian in Coos County, in the State of Oregon, with full liberty of ingress, egress, and regress at all times with or without horses, cattle, carts, and wagons for the purpose of searching for working getting or carrying away the mines and minerals and with full liberty to sink, drive, make and use pits, shafts, audits, air courses and water courses and to erect and set up fire and other engines, machinery and works and to lay railroads and other roads in, under and over any part for conveniently working said mines and minerals, and also to use any surface of said land for depositing water and other substance which may be gotten from said mines, and do other acts and things necessary for working and getting the mines and minerals according to the most

approved practice of mining in the district, and also the right to make and construct logging roads and other ways over and across said lot three as may be necessary for the purpose of logging off the timber standing lying and being on the west half of the southeast quarter and lot numbered two of section 36, in Township 25 South of Range 13 West of Willamette Meridian, from and off said last described land to the navigable waters of Isthmus Slough; also the right to build, construct and use a railway, tramway or other way as may be necessary for the purpose of carrying away all veins, seams and beds of coal or other mineral found in, upon or under the lands above described, and not sold by these presents, to the navigable waters of Isthmus Slough; Also the right to place, deposit and heap upon such portion of said lot three as may be convenient for that purpose which may be taken from any mines which said grantee, its successors or assigns may work on the west half of the southeast quarter and lot two of said land, together with the perpetual right of way over and across the lands granted and conveyed for all purposes whatsoever to and from the west half of the southeast quarter and lot two of said section 36 to the navigable waters of Isthmus Slough, said right of way to be the width of thirty feet and located on the best and most practicable route, provided the said grantee, its successors and assigns shall be actuated by a due regard to the rights of the owners of the land of said lot three, and locate such right of way in such manner

as to injure as little as possible the owners of said lands in the enjoyment of their rights in the land and yet accomplish the purpose and object of the hereinbefore and hereinafter grant; also, hereby granting unto the said grantee herein its successors and assigns, the right to build, erect and use a tramway from said lot three connecting with the right of way aforesaid and passing over and across the boom of E. B. Dean & Co., in front of said lot three near where what is known as the old Davis Coal house was located, and also the right to build, erect and use a wharf and bunker outside of the said boom at the end of the said tramway, provided, that the span shall not be less than thirty two feet in width so as not to interfere with the passing of logs to and from said boom. This deed and conveyance, beside conveying to the said Title Guarantee and Abstract Company, trustee and to its successors and assigns the whole and complete title to the said lot two (2) the northeast quarter and the west half of the southeast quarter of said section 36 is intended to convey and set over to the said Title Guarantee and Abstract Company, trustee aforesaid and to its successors and assigns all the rights, privileges, interest, property and authority reserved by deed given by John Norman and Dora Norman his wife to E. B. Dean, David Wilcox and C. H. Merchant, partners as E. B. Dean & Co., dated October 18, 1884, and recorded November 18, 1884 in Book 13 of record of deeds for Coos County, State of Oregon, at page 441 thereof, and also the rights property, in-

terests, privileges, liberties and authority granted by deed given Elisha B. Dean and Jeanette W. Dean, his wife, David Wilcox and Mary Ann Wilcox, his wife, C. H. Merchant and Mary L. Merchant, his wife, to John Norman, dated November 5, 1884 and recorded November 18, 1884 in Book 13, record of deeds for Coos County, Oregon, at page 438 thereof together with all rights privileges, license, property and authority we or either of us may have in, to or connected with said property (lot three and the tide lands abutting thereon and the water front thereto) or any part thereof, obtained or reserved by said reservations in said deed and by said deeds or had or obtained from any other source or by any other manner whatsoever, together with all and singular the tenements; hereditaments and appurtenances thereunto belonging or in anywise appertaining, and also all our estate, right, title and interest in and to the same, including dower and claim of dower, curtesy and right of curtesy.

TO HAVE AND TO HOLD the above described and granted premises, rights, license, privileges, property and authority unto the said Title Guarantee and Abstract Company, a corporation trustee, and to its successors and assigns forever. And the said Christian Herrmann and Dora Herrmann grantors above named do covenant to and with the said grantee above named, its successors and assigns, that they are lawfully seized in fee simple of the above granted premises, that the above granted premises are free from

all liens and incumbrances, and that we will and our heirs, executors and administrators shall warrant and forever defend the above granted premises and every part and parcel thereof, against the lawful claims and demands of all persons whomsoever.

IN WITNESS WHEREOF, we the grantors above named have hereunto set our hands and seals this the 30th day of August, 1905.

Dora Herrmann, (Seal)

By John F. Hall, his attorney
in fact.

Christian Herrmann, (seal)

John F. Hall, her attorney in fact.

Done in the presence of:

James T. Hall, R. C. Cordes.

State of Oregon,

County of Coos.—ss.

BE IT REMEMBERED, That on this 31 day of August, 1905, before me, the undersigned, a Notary Public in and for said County and State, personally appeared the within named Christian Herrmann, and Dora Herrmann, his wife, by John F. Hall, attorney in fact for the said Christian Herrmann and Dora Herrmann, his wife, who is personally known to me to be the attorney in fact of the said Christian Herrmann and Dora Herrmann, the identical individuals described in and who by their said attorney in fact executed the above, foregoing and within instrument, and the said John F. Hall as the attorney in fact of the said Christian Herrmann and Dora Herrmann

acknowledged to me that he executed the above and foregoing and within instrument as the attorney in fact of, and for, and as the act and deed of the said Christian Herrmann and Dora Herrmann, and that as such he executed the same freely and voluntarily for the uses and purposes therein named.

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed my notarial seal this 31 day of August, 1905.

(Seal) James T. Hall,

Notary Public for Oregon.

Recorded September 1, 1905.

James Watson, County Clerk.

EXHIBIT "C."

THIS INDENTURE WITNESSETH, That Title Guarantee & Abstract Company, a corporation organized and existing under and by virtue of the laws of the State of Oregon, the first party, for and in consideration of the sum of one Dollar and other valuable consideration to it paid, the receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell, convey and quitclaim unto East Marshfield Land Co., a corporation organized and existing under and by virtue of the laws of the State of Oregon, the second party, all its right, title and interest in and to the following described real property situated in the County of Coos, State of Oregon, to-wit: All that portion of lot Two (2) and the North-east quarter ($NE\frac{1}{4}$) of Section Thirty-six (36) in Town-

ship Twenty-five (25) South, of Range Thirteen (13) West of the Willamette Meridian, which is covered by the plat of the townsite of East Marshfield, now on file and of record in the County Clerk's office of Coos County, Oregon, and more particularly all that portion of Blocks Thirty-eight (38) Thirty-nine (39) Fifty-six (56) Fifty-five (55) Fifty-four (54) Fifty-three (53) and Fifty-two (52) thereof which overlap and are located by said plat upon said North-east quarter (N. E. $\frac{1}{4}$) and on said lot Two (2). Together with the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining.

TO HAVE AND TO HOLD unto the said second party, its successors and assigns forever.

IN WITNESS WHEREOF, the said first party has caused these presents to be executed by its president and Secretary by virtue of a resolution of its Board of Directors heretofore duly adopted.

Dated this 23rd day of December, 1907, at Coos County, Oregon.

Title Guarantee & Abstract
Company

(Corporate By Henry Sengstacken, President.
Seal) Title Guarantee & Abstract
 Company
 By C. A. Sehlbrede, Secretary.

Signed and sealed in the presence of:

Geo. F. Winchester,

R. T. Street.

State of Oregon,
County of Coos,—ss.

On this 23rd day of December, 1907, before me, the undersigned, a Notary Public for Oregon, in and for the County of Coos, appeared Henry Sengstacken and C. A. Sehlbrede to me personally known, who being duly sworn did say that he, the said Henry Sengstacken is President, and he, the said C. A. Selbrede is Secretary of Title Guarantee & Abstract Company, a corporation, that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors: and the said Henry Sengstacken and C. A. Sehlbrede acknowledged said instrument to be the free act and deed of said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year last above written.

R. T. Street,

(Seal) Notary Public for Oregon.

Recorded December 24, 1907, 11:30 A. M.

James Watson, County Clerk.

By Robt. R. Watson, Deputy.

EXHIBIT "D."

1021. KNOW ALL MEN BY THESE PRESENTS,
That L. D. Smith and Rosa M. Smith, husband and wife, Henry Sengstacken and Agnes R. Sengstacken, husband and wife, and Z. T. Siglin, a bachelor, all of Coos County, Oregon, in consideration of One Hun-

dred (\$100.00) Dollars, to them in hand paid by Eastside Land Company, do hereby remise, release and forever quitclaim unto the said Eastside Land Company, and unto its successors and assigns all their right, title and interest in and to the following described parcels of real estate, situated in the County of Coos and State of Oregon, to-wit: The Northeast One Quarter (N. E. $\frac{1}{4}$) Lot Two (2), and the West One Half (W. $\frac{1}{2}$) of the Southeast One Quarter (S. E. $\frac{1}{4}$) of Section Thirty Six (36) in Township Twenty Five (25) South, of Range Thirteen (13) West of the Willamette Meridian, excepting therefrom, however, all such portions of officially recorded plats of Eastside and Home Addition to Eastside, Coos County, Oregon, as have previously been deeded or contracted by Title Guarantee and Abstract Company, Trustee, and which sales by deed or contract we hereby in all respects approve and confirm as well as all its acts connected with the sale of such property. And also excepting from the above described property, that part of the Northeast One Quarter and Lot Two, of Section 36 in Township 25 South of Range 13 West of the Willamette Meridian, contained in Blocks 38, 39, 52, 53, 54, 55 and 56 of the Townsite of East Marshfield, as per plat and dedication thereof on file and of record in the office of the County Clerk of said Coos County, as described in deed from the Title Guarantee and Abstract Company, Trustee, to the East Marshfield Land Company, recorded on page 168, Volume 49, Deed Records of Coos County, Ore-

gon, and to which deed reference is hereby made. Also conveying hereby, Lots Ten (10) and Eleven (11) in Section 31, of Township 25 South, of Range 12 West of the Willamette Meridian, and also all the rights and privileges as conveyed by deed from Dora Herrmann and her husband to Title Guarantee and Abstract Company, a corporation, trustee, as recorded in Volume 41, Page 336, of the Records of Deeds of Coos County, Oregon, to which deed reference is hereby made. This deed is given for the purpose of conveying all interests each and all of said grantors may have in and to any of said land, which has been held in trust for us by the Title Guarantee and Abstract Company, Trustee.

TO HAVE AND TO HOLD the same together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining to the said Eastside Land Company and to its successors and assigns forever.

IN WITNESS WHEREOF, We have hereunto set our hands and seals this 30th day of June, A. D. 1911.

L. D. Smith, (Seal)

Rosa M. Smith, (Seal)

Henry Sengstacken (Seal)

Agnes R. Sengstacken (Seal)

Z. T. Siglin, (Seal)

Signed, sealed and delivered in the presence of us as witnesses:

Edw. A. Harris,

C. A. Sehlbrede.

State of Oregon,
County of Coos,—ss.

BE IT REMEMBERED, That on this 30th day of June A. D. 1911 before me, the undersigned, a Notary Public in and for said County and State, personally appeared the within named L. D. Smith, and Rosa M. Smith, husband and wife, Henry Sengstacken and Agnes R. Sengstacken, husband and wife, and Z. T. Siglin, a bachelor, all of whom are personally known to me to be the identical individuals described in and who executed the within instrument, and acknowledged to me that they executed the same freely and voluntarily.

IN TESTIMONY WHEREOF, I have hereunto set my hand and Notarial Seal the day and year last above written.

C. A. Sehlbrede,

(Seal) Notary Public for Oregon.)

Recorded July 3, 1911, 10:30 A. M.

James Watson, County Clerk.

EXHIBIT "E."

1148. KNOW ALL MEN BY THESE PRESENTS, That J. J. Clinkinbeard and Philura Clinkinbeard, husband and wife, S. S. Rogers and Delia M. Rogers, husband and wife, D. L. Rood and Ella M. Rood, husband and wife, James T. Hall and Alice Hall, husband and wife, John F. Hall and Mary Hall, husband and wife, all of Coos County, Oregon, and William O. Christensen and Mattie Christensen, husband and wife, of Marion County, Oregon, in consid-

eration of Ten Dollars to them in hand paid by Eastside Land Company, a corporation of Oregon, do hereby remise, release and forever quitclaim unto the said Eastside Land Company, and unto its successors and assigns, all their right, title and interest in and to the following described parcels of real estate situated in the County of Coos and State of Oregon, to-wit: The Northeast One Quarter ($NE\frac{1}{4}$) Lot Two (2), and the West One Half ($W.\frac{1}{2}$) of the Southeast One Quarter ($SE\frac{1}{4}$) of Section Thirty-six (36) in township Twenty Five (25) South, of Range Thirteen (13) West of the Willamette Meridian, excepting therefrom however, all such portions of officially recorded plats of Eastside and Home Addition to Eastside, Coos County, Oregon, as have previously been deed or contracted by Title Guarantee and Abstract Company, Trustee, and which sales by deed or contract we hereby in all respects approve and confirm as well as all its acts connected with the sale of such property. And also excepting from the above described property, that part of the Northeast One Quarter and Lot Two, of Section 36 in Township 25 South of Range 13 West of the Willamette Meridian, contained in Blocks 38, 39, 52, 53, 54, 55 and 56 of the Townsite of East Marshfield, as per plat and dedication thereof on file and of record in the office of the County Clerk of said Coos County, as described in deed from the Title Guarantee and Abstract Company, Trustee, to the East Marshfield Land Company, recorded on Page 168, Volume 49.

Deed Records of Coos County, Oregon, and to which deed reference is hereby made. Also conveying hereby Lots Ten (10) and Eleven (11) in Section 31, of Township 25 South of Range 12 West of the Willamette Meridian, and also all the rights and privileges as conveyed by deed from Dora Herrmann and husband to Title Guarantee and Abstract Company, a corporation, Trustee, as recorded in Volume 41, Page 336, of the Records of Deeds of Coos County, Oregon, to which deed reference is hereby made. This deed is given for the purpose of conveying all interests each and all of said grantors may have in and to any of said land, which has been held in trust by the Title Guarantee and Abstract Company, Trustee; and we hereby state and certify, that we are all of and the only persons owning or holding any interest in said premises, except Henry Sengstacken and wife, L. D. Smith and wife, and Z. T. Siglin; and together with them we are the only parties ever represented under the Trusteeship of the Title Guarantee and Abstract Company, a corporation, which holds title to the within described property under certain deeds of record in the official records of Coos County, Oregon.

TO HAVE AND TO HOLD the same, together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining to the said Eastside Land Company and to its successors and assigns forever.

IN WITNESS WHEREOF, We have hereunto

set our hands and seals this first day of July A. D. 1911.

J. J. Clinkinbeard, (Seal)

Philura Clinkinbeard, (Seal)

S. C. Rogers, (Seal)

Delia M. Rogers, (Seal)

D. L. Rood, (Seal)

Ella M. Rood, (Seal)

James T. Hall, (Seal)

Alice Hall, (Seal)

John F. Hall, (Seal)

Mary Hall, (Seal)

William O. Christensen, (Seal)

Mattie Christensen, (Seal)

Signed, sealed and delivered in the presence of us as witnesses:

Dorsey Dreitzer,

John Ferguson,

C. J. Carson,

A. J. Shumaker.

Witnesses to the Signatures of William O. Christensen and Mattie Christensen.

State of Oregon,

County of Coos.—ss.

BE IT REMEMBERED, That on this 6th day of July A. D. 1911, before me the undersigned, a Notary Public in and for said County and State personally appeared the within named D. L. Rood and Ella M. Rood, husband and wife, James T. Hall and Alice Hall, husband and wife, John F. Hall and Mary Hall,

husband and wife, S. C. Rogers and Delia M. Rogers, husband and wife, and each one and all of whom are personally known to me to be the identical individuals described in and who executed the within instrument, and acknowledged to me that they executed the same freely and voluntarily.

IN TESTIMONY WHEREOF, I have hereunto set my hand and Notarial Seal the day and year last above written.

Dorsey Kreitzer,
(Seal) Notary Public for Oregon.

State of Oregon,
County of Marion.—ss.

BE IT REMEMBERED, That on this 19th day of July A. D. 1911, before me the undersigned, a Notary Public in and for said County and State, personally appeared the within named William O. Christensen and Mattie Christensen, husband and wife, both of whom are personally known to me to be the identical individuals described in and who executed the within instrument, and acknowledged to me that they executed the same freely and voluntarily.

IN TESTIMONY WHEREOF, I have hereunto set my hand and Notarial Seal the day and year last above written.

A. J. Shumaker,
(Seal) Notary Public for Oregon.

Recorded July 24, 1911, 4:30 P. M.

James Watson, County Clerk.

[Endorsed] Bill of Complaint. Filed Nov. 1, 1912.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 25 day of June, 1913, there was duly filed in said Court, an Answer, in words and figures as follows, to wit:

[Answer.]

(Title.)

To the Honorable, the Judges of the District Court of the United States for the District of Oregon:

Come now the defendants, John F. Hall, Mary Hall, his wife, L. D. Smith, Rosa M. Smith, his wife, Henry Sengstacken, Agnes R. Sengstacken, his wife, Z. T. Siglin, J. J. Clinkinbeard, Philura Clinkinbeard, his wife, S. C. Rogers, Delia M. Rogers, his wife, D. L. Rood, Ella M. Rood, his wife, James T. Hall, Alice Hall, his wife, William O. Christensen, Mattie Christensen, his wife, Title Guarantee and Abstract Company, a corporation, trustee, Title Guarantee and Abstract Company, a corporation, Eastside Land Company, a corporation, and for their joint and several answers to the bill of the Complainant filed herein, do admit, deny and allege as follows:

I.

Deny each and every allegation in said Bill of Complaint contained, except as hereinafter specifically stated, qualified or admitted.

II.

Answering paragraph "I" thereof, defendants allege that they have not information of the truth or falsity of the facts therein alleged sufficient to form a belief, and therefore deny the same.

III.

Answering paragraph "II" thereof, defendants admit the allegations therein contained.

IV.

Answering paragraph "III" thereof, defendants admit the allegations therein contained as applies to themselves, but allege as to the citizenship and habitation of the other defendants named herein, they have not sufficient information with reference thereto to enable them to form a belief, and therefore deny the same.

V.

Answering paragraph "IV" thereof, defendants admit the allegations therein contained.

VI.

Answering paragraph "V" thereof, defendants admit that Dora Herrmann on the 17th day of May, 1905, claimed to be the owner of and entitled to the possession of the Northeast quarter, the West half of the Southeast quarter, and Lot 2 of Section 36, Township 25, South, Range 13 West of the Willamette Meridian, Coos County, Oregon; but defendants deny that the said Dora Herrmann had a clear and unclouded title to said lands, and allege that the title of the said Dora Herrmann to said lands was clouded

and in doubt by reason of certain defects in certain mortgage foreclosure proceedings, under and by virtue of which the said Dora Herrmann claimed her title; and by reason of said defects, it was and is a legal question whether the said Dora Herrmann was in fact the owner of said lands, or had any title therein which she might convey; and defendants further allege that on said May 17, 1905, the said Dora Herrmann and this complainant, her husband, by their attorney in fact, John F. Hall, did agree to sell said lands to defendants Sengstacken and Smith, and that thereafter upon making a title the said Dora Herrmann and this complainant, her husband, by their said attorney in fact, John F. Hall, did, on August 31st, 1905, convey said premises and all their right and title therein to Title Guarantee & Abstract Company, a corporation, trustee, for and on behalf of Sengstacken and Smith and their associates; and the defendants do deny that the said Dora Herrmann or this complainant has ever had any interest whatever in said lands since or after the said date of August 31st, 1905.

VII.

Answering paragraph "VI" thereof, defendants admit that said Dora Herrmann and this complainant were, from and after the 8th day of June, 1902, to the 18th day of September, 1905, husband and wife and residents of the Empire of Germany; but said defendants do allege that they have no knowledge as to whether or not this complainant was unacquainted

with the English language, customs, laws and conditions of the United States of America, or whether or not this complainant knew the value of the property in the Bill of Complaint described, or whether or not this complainant had ever been in the United States or within many thousand miles of said described property, sufficient to form a belief, and therefore deny the same; that defendants have no knowledge sufficient to form a belief as to whether the said Dora Herrmnan did have and repose great confidence in the honesty, reputation, integrity and ability of the said John F. Hall, and therefore deny the same; defendants deny that the said John F. Hall was the confidential adviser of the said Dora Herrmann, and deny that the said John F. Hall was her legal adviser under any general retainer, and allege that he was her legal adviser only in such specific matters as he might be retained; and defendants admit each and every other allegation in said paragraph contained.

VIII.

Answering paragraph "VII" thereof, defendants admit that the said Dora Herrmann died in Germany on the 18th day of September, 1905, but allege that as to whether she died intestate, leaving this complainant as her only heir at law and entitled to all her property real and personal, the defendants have no knowledge or information sufficient to form a belief and therefore deny the same.

IX.

Answering paragraph "VIII" thereof, defendants

deny that John F. Hall is now or ever has been a stockholder in defendant corporation, Title Guarantee & Abstract Company; and defendants admit each and every other allegation therein contained.

X.

Answering paragraph "IX" thereof, defendants deny each and every allegation therein contained.

XI.

Answering paragraph "X" thereof, defendants admit that John F. Hall as attorney in fact of said Dora Herrmann and this complainant, did on the 30th day of August, 1905, make, execute and deliver to the defendant Title Guarantee & Abstract Company, trustee, a certain deed of conveyance, a copy of which is attached to the Bill of Complaint herein marked "Exhibit B," and defendants admit that said deed was recorded as alleged by complainant; and said defendants deny each and every other allegation therein contained except as may be hereinafter specifically stated, admitted or qualified.

XII.

Answering paragraph "XI" thereof, defendants admit the transfer by the Title Guarantee & Abstract Company, a corporation, trustee, to the East Marshfield Land Company, a corporation, of the title to the property as therein alleged, but the defendants deny that said transfer was made with knowledge of the matters and things alleged in said Bill of Complaint, and deny that said transfer was made wrongfully or fraudulently in any manner whatsoever; and deny

that the East Marshfield Land Company, now or since, has held said title so transferred wrongfully or in violation of the right of this complainant; and defendants do deny that said East Marshfield Land Company is now without right or title in said premises, or that said deed to said East Marshfield Land Company is a cloud upon the title of this claimant; but defendants do allege that the said East Marshfield Land Company in acquiring the title as in said paragraph "XI" set out, did so as an innocent purchaser, without any knowledge whatsoever of any equity in favor of this complainant.

XIII.

Answering paragraph "XIa" thereof, defendants admit that the said Title Guarantee & Abstract Company, trustee, made, executed and delivered to defendant East Side Land Company a deed of conveyance on the 22nd day of July, 1911, to the lands or portions thereof described in this Bill of Complaint, and that said deed was duly recorded; and said defendants deny each and every other allegation in said paragraph contained.

XIV.

Answering paragraph "XII" thereof, defendants admit that they did during all the times mentioned in said Complaint, reside in the vicinity of said described property, and that they were acquainted with each other and with the defendant John F. Hall and with said land and its value; and defendants admit that said land is located near the City of Marshfield,

Oregon, and abuts on one of the inlets of Coos Bay, and that said Title Guarantee & Abstract Company caused a portion of said land to be platted into lots and blocks for townsite purposes, and thereafter sold certain of said lots for sums of money in items as set forth in the account marked "Exhibit A." attached hereto and made a part hereof; and these defendants do deny that said defendant Title Guarantee & Abstract Company, or any of the other defendants herein, has ever received any further, other or different amount or amounts from the sale or use of said lands or any portion thereof than as shown by said "Exhibit A."; that said account marked "Exhibit A." shows the true state of the financial transactions since the date of conveyance of said lands of August 30th, 1905, and said account shows what part of the proceeds and avails from said lands were paid upon the purchase price thereof and what portions were disbursed for other purposes, and defendants deny that the facts with reference to the sale of lots or the disbursements of the proceeds thereof are any different or otherwise than as shown by said "Exhibit A."; and said defendants do deny each and every other allegation in said paragraph contained.

XV.

Answering paragraph "XIII" thereof, the defendants admit the appointment of John F. Hall as administrator of the estate of said Dora Herrmann, and admit that he acted in said capacity until discharged on the 12th day of December, 1906; and the defend-

ants admit that this complainant after the death of Dora Herrmann retained the said defendant, John F. Hall as his agent to attend to his property interests in Coos County, Oregon, until April 1909; and defendants deny each and every other allegation in said paragraph contained.

XVI.

Answering paragraph "XIV" thereof, defendants admit that this complainant came to the City of Marshfield, Coos County, in April 1909, and at the time that the defendant John F. Hall was the duly elected, qualified and acting County Judge of said County; and defendants deny each and every of the other allegations in said paragraph contained.

XVII.

Answering paragraph "XV" thereof, defendants admit the conveyances therein alleged and set forth as being made to the Eastside Land Company, but defendants deny that such conveyances were made for the purpose or with the intent of wrongfully or corruptly depriving this Complainant of, or defrauding him of his right, title or interest in or to said described property or to cloud the title thereof, and deny, that said conveyances were made by the Grantors with full knowledge of all the facts set forth and contained in the Bill of Complaint herein, or with knowledge of any facts which would in any way or wise tend to invalidate said conveyances, and deny that said conveyances have clouded this complainant's

title, and deny that he has any title to said described lands.

XVIII.

Answering paragraph "XVI" thereof, defendants admit that on July 1, 1911, J. J. Clinkinbeard, Philura Clinkinbeard, S. C. Rogers, Delia M. Rogers, D. L. Rood, Ella M. Rood, James T. Hall, Alice Hall, John F. Hall, Mary Hall, William O. Christensen, and Mattie Christensen did execute and deliver to the defendant Eastside Land Company a quit claim deed to said described lands or portions thereof, a copy of which said deed is marked "Exhibit E." and attached to the Bill of Complaint herein, and further admit that said deed was thereafter duly recorded; and defendants deny each and every other allegation in said paragraph set out.

XIX.

Answering paragraph "XVII" thereof, defendants do admit that the defendant Title Guarantee & Abstract Company has executed and delivered deeds to premises of said described property to persons named in said paragraph; and defendants deny each and every other allegation in said paragraph contained.

XX.

Answering paragraph "XVIII" thereof, defendants admit that defendant Title Guarantee & Abstract Company has collected and received up to the time of conveyance to defendant Eastside Land Company from the rents, timber and profits of said described lands such a sum of money as is shown on "Exhibit

A." to have been received before said date of conveyance and transfer, and defendants deny that the Title Guarantee & Abstract Company or any other defendant has received any further or different sums than as in said account set out; and defendants admit that this complainant requested and demanded an accounting of all the rents, issues, timber and profits from said described lands since the 30th day of August, 1905, and defendants allege that this complainant was then and there referred to said accounting, which is a copy of "Exhibit A." attached to the Answer to the original Bill of Complaint herein, and which was then and there in this complainant's possession; and defendants admit that this complainant on the day of January, 1912, tendered to defendant Title Guarantee & Abstract Company the sum of Forty-four Hundred dollars (\$4400.00) with interest thereon at the rate of six per cent. per annum from the 30th day of August, 1905, and then and there requested the execution and delivery of a deed of conveyance to said described lands to this complainant, and that the said defendant Title Guarantee & Abstract Company refused to accept said offer and tender of said sum and refused to execute and deliver to this claimant said deed so requested; and defendants deny each and every other allegation in said paragraph contained.

XXI.

Answering paragraph "XIX" thereof, defendants admit each and every allegation therein contained.

XXII.

Answering paragraph "XX" thereof, defendants admit the relation of wifehood as therein alleged, and deny each and every other allegation therein contained.

XXIII.

Answering paragraph "XXI" thereof, defendants admit that this complainant has no plain, speedy or adequate remedy at law, and allege that he has been subject to no injury and therefore has no remedy either at law or in equity.

XXIV.

Answering paragraph "XXII" thereof, defendants admit the allegations therein contained.

XXV.

And as a first, further and separate answer and defense to the complaint herein, defendants do allege:

1. That on May 17th, 1905, Dora Herrmann and this complainant, her husband, were living in the Empire of Germany; that the said Dora Herrmann then claimed to be the owner of the lands described in the complaint; that the said Dora Herrmann and the complainant, her husband, had therefore appointed defendant John F. Hall as their attorney in fact under a duly executed general power of attorney by virtue of which the said Hall was empowered to sell and convey in their behalf the lands described in the complaint.

2. That the said Dora Herrmann was a woman

with marked business capacity and had shrewdly managed her own business affairs since the death of her husband in 1896; that the said Dora Herrmann, before removing to Germany in 1902, had lived in close proximity to the lands described in the complaint for upwards of twenty-five years and knew all about the location, condition and topography of the lands described, the then value thereof, and the possibilities of enhancement; that after removing to Germany and up to the time of her death on September 18th, 1905, the said Dora Herrmann solely managed her affairs in Coos County and kept herself advised by correspondence and subscribing to Marshfield, Oregon newspapers, of the progress and development of the community; that the said Dora Herrmann was very anxious to dispose of her Coos County property and repeatedly scolded her attorney in fact because he was not able to make earlier sales, and especially urged her said attorney in fact to sell the lands described in the complaint; that there was no marked change in the local conditions of Marshfield from the time of the removal of said Dora Herrmann to Germany to the time of the conveyance of said property, which would tend to enhance the value of said property.

3. That said Dora Herrmann being fully advised as to the value of her property, did in April and June 1905, specifically authorize and direct her said attorney in fact to sell the said described lands for the price of \$4000.00;

4. That on May 17th, 1905, the said defendant

John F. Hall, as attorney in fact for said Dora Herrmann and this complainant, did sell said lands to defendants Henry Sengstacken and L. D. Smith for the price of \$4400.00,—\$2200.00 cash and \$2200.00 due in one year at 6 per cent interest per annum secured by purchase price mortgage; that said purchasers then and there paid down to said Hall the sum of \$100.00 in the form of an unconditional promissory note due in ten days signed by both purchasers; that the balance of said cash, \$2100.00, was agreed to be paid when said Hall should furnish a satisfactory abstract of title; that the said Hall then ordered an abstract and the title was accepted by defendants Smith and Sengstacken in the latter part of August, 1905;

5. That said price of \$4400.00 was the then reasonable market value of said property and was the highest and best price obtainable by said Hall; that said lands were never reasonably worth any greater sum than \$4400.00 at any time during the interval from May 17th, 1905, to August 31, 1905.

6. That in August 1905, the said Sengstacken and Smith decided to form a syndicate to take over their purchase of said lands; and the said Sengstacken and Smith did interest with them defendants, S. C. Rogers, J. J. Clinkinbeard, D. L. Rood and one Herbert Rogers who is not named as a defendant herein; that the said Sengstacken and Smith agreed with said persons to form a syndicate to take over the purchase of said lands, and each of said persons agreed to pay in on the purchase price in proportion as follows:

Henry Sengstacken, three-twelfths

L. D. Smith, three-twelfths

J. J. Clinkenbeard, two-twelfths

S. C. Rogers, two-twelfths

D. L. Rood, one-twelfth

Herbert Rogers, one-twelfth

and it was agreed and understood that said syndicate should take over the purchase of said lands by Sengstacken and Smith and that each should have an interest in said property according to the proportion of his payment as agreed aforesaid; and it was further agreed and understood by the several members of said syndicate that title to said property should be taken in trust for their benefit in the name of Title Guarantee & Abstract Company, a corporation, trustee;

7. That upon acceptance of said title by said Sengstacken and Smith in the latter part of August, 1905, it was then and there agreed by and between said Sengstacken and Smith on their own behalf and on behalf of said syndicate, and said John F. Hall attorney in fact, that said deed should be made and executed ready for delivery on August 30th, 1905, and should run to Title Guarantee & Abstract Company, a corporation, trustee, as grantee, and that on said 30th day of August, 1905, the first payment of said purchase price of \$2200.00 should be fully paid by said syndicate and a purchase price mortgage securing the balance of \$2200.00, should also on August 30th, 1905 be executed by said grantee and delivered

to said attorney in fact;

8. That in the forenoon of August 30th, 1905, pursuant to said understanding and agreement said S. C. Rogers and J. J. Clinkenbeard went to the office of said Hall and paid to said Hall their proportionate shares of said \$2200.00, and then and there said Hall read to them said deed of said property, which was then and there by them approved and accepted; that during said day L. D. Smith, and D. L. Rood paid in their proportionate shares of said purchase price to defendant Henry Sengstacken; that after said payments into Sengstacken and Hall as aforesaid the said Herbert Rogers refused to make payment of his proportionate interest; that said Sengstacken on the afternoon of said day paid over to said Hall the proportionate interest of himself, Smith and Rood, and then and there, without the knowledge of any other member of said syndicate, stated to said Hall that said Herbert Rogers had refused to take up his one-twelfth interest, and then and there suggested and asked said Hall to take the interest of said Herbert Rogers in lieu of commissions; that said Hall refused to take said interest alone, but agreed with his brother and partner, J. T. Hall to take said interest in the name of Hall & Hall; that the deed and mortgage were then on the following day acknowledged and delivered and defendant John F. Hall on August 31st, 1905, sent a statemnet of account to said Dora Herrmann, remitting to her the balance of said purchase price in his hands after deducting his agreed commissions and

other expenses incidental to her other properties.

10. That said defendant John F. Hall never had any idea of participating in any manner in said purchase until the said Sengstacken requested him to take the interest of Herbert Rogers in lieu of commissions as alleged aforesaid; that said defendant John F. Hall sold said land for the best price obtainable and in every way to the advantage of Dora Herrmann and this complainant, and in the selling of said land, in no way acted for himself or in his own interest; that said sale was made and consummated before the said John F. Hall thought of taking, or agreed to take, any interest therein.

11. That the interest of each and all the members of said purchasing syndicate has passed by assignment and conveyance to defendant Eastside Land Company, a corporation, subject to certain lot sales as alleged in the Bill of Complaint; and the said Eastside Land Company is now the owner of the lands described in the complaint, free from any and all equities in this complainant.

XXVI.

And as a second, further and separate defense to said complaint, defendants do allege:

1. That said Dora Herrmann or this complainant on May 17th, 1905, or at any time subsequent thereto, never owned the lands described in the complaint or any part thereof and had no right to make a sale or conveyance thereof; but that said title was then in other persons and the same has since been acquired by

mesne conveyance by defendant Eastside Land Company, a corporation.

XXVII.

And as a third, further and separate defense to said complaint, defendants do allege:

1. That said defendants Henry Sengstacken and L. D. Smith on May 17, 1905, purchased said described lands from Dora Herrmann and this complainant by and through their said attorney in fact John F. Hall; that in such purchase and sale there was no collusion, confederation or conspiracy whatsoever between said purchasers and said Hall in fraud of the rights of said Dora Herrmann or this complainant or otherwise; that said purchase was made by said Sengstacken and Smith without any expectation, knowledge or suspicion on their part that said Hall was thereafter to acquire any interest in said property; that said sale and purchase was in no way tainted with fraud, and the said Dora Herrmann received the reasonable market value of said property; that thereafter in taking over the title to said property, through no collusion, confederation or conspiracy of said Sengstacken, Smith and Hall, the said Hall acquired a one-twenty-fourth interest therein, and in the acquisition of said interest the said Hall acted in good faith, believing that he was lawfully entitled to take said interest; that thereafter neither these defendants Sengstacken and Smith, nor said Hall, ever intentionally concealed from the said Dora Herrmann or this complainant any of the facts in connection

with said sale and passing of title, but said defendants Sengstacken and Smith believed and presumed that the said Dora Herrmann and this complainant knew all of the facts in connection with said sale at the time thereof or immediately thereafter, and that the said sale and transfer was then and there ratified by said Dora Herrmann and this complainant.

2. And likewise, when said syndicate was formed by defendants Sengstacken, Smith, Rogers, Clinkenbeard, Rood and Herbert Rogers to take over the purchase of said Smith and Sengstacken, there was no collusion, confederacy or conspiracy between them and the said John F. Hall in fraud of the rights or interest of said Dora Herrmann or this complainant, or otherwise; nor did said members of said syndicate nor said Hall expect, believe or suspect that said Hall was thereafter to acquire any interest whatsoever in said property; that the agreement of said syndicate with said Hall to take over the said purchase of Smith and Sengstacken was in no way tainted with fraud, and the said Dora Herrmann received the reasonable market value of said property; that thereafter, in taking over the title of said property, the said Herbert Rogers refused to contribute his proportion of the purchase price as he had theretofore agreed, and the said John F. Hall agreed with his brother to take the interest of said Herbert Rogers in lieu of their commissions; that thereby, after all the other members of said syndicate had paid in their proportionate shares, the said John F. Hall acquired a one-twenty-

fourth interest in said property; that said interest was acquired by said John F. Hall honestly and in good faith, he believing at that time that he had a right to acquire said interest; that said interest was taken by said John F. Hall without any knowledge thereof on the part of any of the members of said syndicate except said Henry Sengstacken and James T. Hall; that thereafter none of the members of said syndicate, nor said Hall, ever intentionally concealed from the said Dora Herrmann or this complainant any of the facts in connection with said sale or passing of title, but the members of said syndicate have each and all believed and presumed that the said Dora Herrmann and this complainant knew all of the facts in connection with said sale at the time thereof or immediately thereafter, and that the said sale and transfer was then and there ratified by said Dora Herrmann and this complainant.

3. That the said interests of said Hall and Hall, and S. C. Rogers, for value received, were thereafter acquired by said Sengstacken.

4. That the said interest of said J. J. Clinkenbeard, for value received, was thereafter acquired by said Smith.

5. That the said interest of D. L. Rood was thereafter, for a valuable consideration, acquired by defendant Z. T. Siglin without any knowledge whatever of any of the facts or circumstances in the matter of the acquisition of the Hall & Hall interest as heretofore alleged.

6. That said Sengstacken, Smith and Siglin, being the owners of all the equitable interests in said property, organized the Eastside Land Company as a holding corporation and caused the legal and equitable title in said property to be conveyed to said Eastside Land Company; and in consideration of such conveyance, each received an amount of the capital stock of said Eastside Land Company in proportion to their respective interests.

7. That the said Eastside Land Company is now the owner of said lands described in the complaint herein except for the sale of a few lots to individual purchasers, and this complainant is neither at law or in equity entitled to any interest therein, and has no just claim to any part thereof.

WHEREFORE, defendants ask that said Complaint be dismissed and that they have judgment for their costs and disbursements herein.

EASTSIDE LAND COMPANY,
by Henry Sengstacken, President.
HENRY SENGSTACKEN,
L. D. SMITH,
Z. T. SIGLIN,

Defendants.

CASSIUS R. PECK,
C. A. SEHLBREDE,

Solicitors in Chancery for Defendants.

EXHIBIT A.

Marshfield, Ore., Sept. 28, 1911

"Eastside" Land Company,

In Acct. with Title Guarantee & Abstract Co.

1907 Debits.

Apr.	13.	Pd. Lee Walters for clearing.....	\$ 2.50
	18.	Pd. J. Longstaff for slashing	6.25
	20	Pd. E. Cutlip for work	11.25
		Pd. Don Doake for work	11.25
		Pd. G. Thompson for slashing	10.00
	15	Pd. L. Walters for clearing	2.50
	29	Pd. W. McWalter for slashing	1.25
	27	Pd. E. Cutlip slashing	7.50
		Pd. R. Small slashing	23.75
		Pd. I. Oustatt	10.25
		Pd. J. F. Long	9.00
		Pd. F. S. Bissett	7.50
May	2.	Pd. Pioneer Hdwe. Co. for axes, brush hooks, grindstone, files etc.	8.70
	3	Pd. Geo. Noah, labor	16.50
		Pd. C. J. Guick, labor	12.50
	10	Abstract No. 5907 covering "Eastside".....	110.00
	11.	Pd. Gettings for survey of Eastside.....	695.00
June	4	Pd. Willey's bill of June 1 for pipe	34.80
		Pd. Willey's bill of May 31 for pipe	31.30
May	1	Pd. Launch Central by L. D. Smith.....	4.40
	10	Pd. W. I. Condron labor	22.50
		Pd. T. J. Krick labor	1.25
		Pd. G. Pasco labor	11.25
May	31	Pd. Launch Central for sundry trips	3.50
June	7	Pd. Coleman for repairing brush hook.....	.30
	23	Pd. G. Pasco labor	3.00
	29	Pd. Pioneer Hdwe. Co. bill of July 2.....	2.70
July	18	Pd. Flem. Hargen for balance of slashing.....	36.25
	19	Pd. Geo. Harding for slashing	55.50
	24	Pd. Kreuger for fares for slashing	7.20
	15	Pd. 2 boat fares .....	.20
Aug.	1	Pd. Geo. V. Harris, slashing F. & 10 Sts.....	57.50
	12	Pd. W. P. Murphy bill	19.53
Sept.	20	Pd. Pioneer Hdwe. Co. bill	1.75
Nov.	23	Pd. John Lapp for bill of May 8 trip to Mill.....	1.00
Dec.	9	Pd. Costs of filing plat	61.22
	23	Pd. East Mfd. Land Co. for Quitclaim.....	500.00
	9	Pd. balance on filing fee	2.50

	30	Pd. Recording Q. C. deed	1.00
1908			
Jan.	7	Pd. for rye grass and white clover	9.40
	18	Pd. for Lot stakes	2.50
Feb.	14	Pd. A. Vinyard for work to date	10.00
	24	Pd. Harding for work	1.25
Mar.	13	Pd. A. Vinyard for work	10.00
Feb.	3	Pd. A. Vinyard for work	13.75
	26	Pd. Gage for Eastside taxes	69.61
Mar.	14	Pd. Kreuger, Smith fare to Eastside.....	.80
	18	Pd. Jas. Cowan for work	6.00
			<hr/>
Debit footing for'd			\$1942.66
Footing For'd.....			\$1,942.66
1908			
Mar.	28	Pd. A. Vinyard 10 days work.....	25.00
		Pd. Hans Salvog work	53.75
	2	Pd. F. K. Gettings for surveying & blue printing....	24.90
Apr.	2	Pd. Hans Salvog for work	10.00
		Pd. A. Vinyard for	8.75
	1	Pd. Bill of Launch Central of March.....	27.50
May	1	Pd. Bill of Launch Central for April	1.50
	5	Pd. Dredging	637.50
	1	Pd. Corner Stakes	4.13
Apr.	30	Pd. Blasting	5.00
Mar	1	Pd. Marshfield Hawd. Co.	1.00
June	1	Pd. Launch Central, May business	2.25
May	8	Pd. Blasting	7.50
Apr.	14	Pd. Roy Lawhorn for cut of Eastside.....	10.40
May	5	Pd. Getting for ½ of survey of boundary lines.....	24.75
June	20	Making deed for lot 12 block 13.....	2.50
	26	Pd. for powder	48.05
Aug.	20	Pd. for sign "Watch Eastside Grow".....	33.80
	12	Continuing Eastside abstract to date.....	10.50
Sept.	1	Pd. August telegraph bill	10.45
		Pd. August bill for Launch Central	1.50
	23	Pd. 1 Tide box	47.00
		Pd. Abstract Frank Alley, Kidder Homestead Case	19.00
1905	21	Pd. Continuing Abstract 5907 to date	41.50
Aug.	31	Pd. Sehlbredee abst. & making deed & mtg.....	10.00
		Pd. Recording deed	2.00

Nov.		Pd. Boat hire of surveyors	1.00	
		Pd. D. L. Rood 3 da. helping surveyors.....	7.50	
1906	5	Pd. Rideout for 3 da. work	9.00	
Jan.	31	Pd. Polley for surveying	15.00	
Mar.	18	Recd. of partial release C. Hermann to Abst. Co.	.80	
	13	Pd. 1908 Taxes	459.82	
Apr.	8	Pd. Telegraph for March .....	.25
	23	Pd. Additional taxes	1.44	
July	30	Pd. Abst. 18289 Lots 11, 12, Blk. 12 E. S.....	4.00	
	12	Pd. Pajari labor grading Park entrance.....	2.00	
Sept.	14	Pd. Geo. Downing burning brush.....	10.00	
	25	Pd. Dolan for labor	8.75	
	10	Pd. L. D. Smith for burning at Eastside.....	30.00	
Dec.	13	Pd. " " " slashing streets on contract 9 acres	206.20	
1910				
Mar.	5	Pd. Recording Q. C. deed C. Hermann.....	.80	
	15	Pd. Taxes	333.76	
Apr.	29	Pd. Alto for slashing	7.00	
Jun.	11	Pd. P. Dalto for piling brush	4.50	
	22	Pd. C. Dodge for half tone cut of Smith's E. S. mill	3.78	
Jul.	12	Pd. Gettins for surveying Home Add.....	275.00	
Aug.	2	Pd. Prentiss for Photos of Eastside.....	.50	
	16	Pd. Balance 1909 Land taxes	39.38	
Sept.	1	Pd. Clerk's filing fee	11.00	
Oct.	17	Pd. fee in matter of exam. of Abstract and title to East Marshfield, and written opinion, C. A. Sehl- brede, under date of July 2, 1907, covering 17 type- written pages	35.00	
			<hr/>	
			footings carr'd for'd.....\$4,479.37	
			Footings bro't for'd	\$4,479.37
1909				
Mar.	2	Cont. Abst. 16549 Lot 27 Blk. 14 Linden	2.50	
May	26	To writing 4 copies dic. U. S. Dept. Kidder case.....	2.50	
1911				
Apr.	3	Pd. ½ of 1910 taxes	230.06	
July	1	for taking ackmt. Christensen Q. C. deed.....	1.00	
Aug.	24	Con. Abstract 8101 of Co, property 137 new pgs.....	70.50	
		Pd. Annual license	15.00	
Sept.	5	Pd. filing fee U. S. Dist Court.....	10.00	
May	1	Pd. filing fee, Eastside Land Co. papers.....	1.20	

June 29	Pd. for record book	1.10
Jul. 8	Pd. Peters for Gasoline boat for Siglin.....	3.50
	Pd. for Seal of Eastside Land Co.....	2.75
	Drawing trip. papers inc. Eastside Land Co.	10.00
	10 per cent commission on sales to date as pre list attached;	
	Eastside	\$5405.00
	Home Addition	3310.00
		<hr/>
		\$8715.00 871.50

Total Debits to date\$5718.48

Marshfield, Oregon, Sept. 28, 1911.

List of Eastside Sales to date.

Buyer	Consider- ation	Amt. Paid	Blk.	Lot	Int.
Emal F. Rubanka	\$ 200.00	\$ 200.00	14	25,26	
W. S. Newman	100.00	100.00	36	27,28	
Z. T. Siglin	200.00	200.00	36	29,32	
B. B. Burton	150.00	150.00	14	28,29,30	
S. C. Rogers	300.00	300.00	14	17,22	
W. C. Pennock	175.00	175.00	14	31,32	
John Wall	100.00	100.00	14	5,6	
Z. T. Siglin	200.00	200.00	36	25,26	
H. J. Linden	50.00	50.00	14	27	
W. R. & Louisa B. Haines.....	150.00	150.00	14	11,12,13	
Harvey Smith	195.00	195.00	14	14,15,16	
Geo. Clinkenbeard	150.00	150.00	36	1,2,3	
Anna D. Clinkenbeard	150.00	150.00	36	4,5,6	
L. Grayce Gould	65.00	65.00	33	12	
W. C. Pennock	275.00	275.00	43	29,32	4.05
J. W. Vinyard	425.00	425.00	13	1,4	1.25
A. W. Neal	200.00	200.00	14	7,10	
A. R. Welch	65.00	20.00	36	7	
John F. Bain	200.00	200.00	13	5,6	3.90
M. A. & Minnie McLaggen	200.00	200.00	12	11,12	5.50
" " "	65.00	65.00	12	10	1.50
Aren P. Husby	190.00	190.00	13	10,11	
Robert Miller	65.00	65.00	33	14	
Doris Sengstacken	65.00	65.00	33	13	

Varney & Lewis	450.00	450.00	12	13,16	8.50
C. V. Woodruff	325.00	325.00	33	4,8	
Alto & Pajori	300.00	300.00	13	7,8,9	11.00
C. V. Woodruff	195.00	25.00	33	9,10,11	
Wm. J. Leaton	200.00	50.00	37	6,7	

"Eastside" Plat Totals.....	\$5405.44	\$5040.00			\$35.70
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List of Home Addition Sales to date.

Wm. Vaughn (Option)	10.00	10.00	1.	
Wm. H. Payne	2400.00	1200.00	5,7,8	
Hilda Frederickson	900.00	680.00	1	

	\$3310.00	\$1890.00
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Total Sales to date.....\$8715.00

Total collections to date on Lot sales (Not incl. Interest).....\$6930.00

CREDITS.

Stumpage etc.

1907				
Apr. 23	Stumpage from Masters on Piles.....			37.70
Jul. 15	" " "			123.44
Sep. 23	Sold 40 cords of Spruce bolts			30.00
Oct. 1	Sold 1 iron wedge to John Bear.....			1.25
1908				
May 16	Stumpage on logs Mathews			21.00
1909				
Aug. 24	Cascara Stumpage .....			.50
Sept. 1	Stumpage on 1 fire wood tree			1.25
July 27	" Cascara—Sailing			7.63
Sept. 13	" on fire wood			1.50
1910				
Mar. 16	" from Downing on firewood			3.70
Apr. 27	" on bark .....			.86
Sept. 13	Lumber sold Robinson from Kidder shed.....			7.00
14	Stumpage on bark			1.14
1905				
Oct. 3	" " " Davenport			1.50
Mar. 10	" from Steckel on Logs & Piles			21.31
				\$259.88

1909

Mar. 27	Credit by Taxes returned24
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1911

Sept. 26	"	Tax refund H. Sengstacken for 1/2 1908,		
		1909, 1910 tax in Eastside Plat	125.45	
		Total Lot sales Col. to date per list attached		
		Eastside Plat	\$5040.00	
	"	" Inst.	35.70	
		Home Add Plat	1890.00	6965.70
				<hr/>
		Total Credits to date	7351.27	
	"	Debits " "	5718.48	
				<hr/>
		Credit Balance	\$1632.79	

Debits since September 28, 1911

Sep. 30	Pd.	1910 Taxes	241.90	
Oct. 3	"	" " " .....	.22	
1912				
Feb. 9	Pd.	L. D. Smith labor	114.00	
27		Commission, McGriff sale	20.00	
Mar. 9	"	Steckel "	22.50	
				<hr/>

\$398.62

CREDITS.

		Credit balance, of Statement of Sept. 28, 1911.....	\$1632.79	
Oct. 10	By	Leaton Contract	15.00	
16	"	Frederickson Contract	40.00	
7	"	Tax refund from Abstract Co.	37.00	
11	"	Leaton Contract	15.00	
	"	" Interest	1.40	
16	"	Frederickson Contract	30.00	
Dec. 9	"	Leaton Contract	15.00	
16	"	Frederickson Contract	25.00	
1912				
Jan. 11	"	Leaton "	15.00	
13	"	Frederickson "	25.00	
Feb. 17	"	Frederickson "	25.00	
7	"	Payne "	36.00	
27	"	McGriff "	50.00	
Mar. 9	"	Leaton "	15.00	
Feb. 27	"	" "	7.50	
Apr. 10	"	Steckel "	10.00	
13	"	McGriff "	15.00	

10	"	Leaton	"	.....	7.00
16	"	Tax refund Fredrickson		.....	2.35
	"	Fredrickson Contract		.....	50.00
18	"	Tax Refund H. Sengstacken		.....	47.36
Mar. 2	"	Wm. Steckel Contract		.....	25.00
May 10	"	Leaton	"	.....	15.00
					<hr/>
					2156.40
Less debits					..... 398.62
					<hr/>
Credit balance					.....\$1757.78

[Endorsed]: Answer. Filed June 25, 1912.

A. M. CANNON,
Clerk.

And afterwards, to wit, on the 2 day of July, 1912,
there was duly filed in said Court, a Reply, in
words and figures as follows, to wit:

[Reply.]

(Title.)

The above named complainant, in reply to the answer of the defendants filed herein, admits and denies as follows:

I.

Denies each and every allegation contained in said answer, save and except only such as admit the allegations of the bill of complaint filed herein.

II.

Denies each and every allegation contained in Paragraph VI of said answer, save and except only such as therein admit the allegations of the bill of complaint aforesaid.

III.

Denies each and every allegation contained in Paragraph VII of said answer, save and except only such as therein admit the allegations of the bill of complaint.

IV.

Denies each and every allegation contained in Paragraph VIII of said answer, save and except only such as therein admit the allegations of the bill of complaint.

V.

Denies each and every allegation contained in Paragraph IX of said answer, save and except only such as therein admit the allegations of the bill of complaint.

VI.

Denies each and every allegation contained in Paragraph X of said answer, save and except only such as therein admit the allegations of the bill of complaint.

VII.

Denies each and every allegation contained in Paragraph XI of said answer, save and except only such as therein admit the allegations of the bill of complaint.

VIII.

Denies each and every allegation contained in Paragraph XII of said answer, save and except only such as therein admit the allegations of the bill of complaint.

IX.

Denies each and every allegation contained in Paragraph XIII of said answer, save and except only such as therein admit the allegations of the bill of complaint.

X.

Denies each and every allegation contained in Paragraph XIV of said answer, save and except only such as therein admit the allegations of the bill of complaint.

XI.

Denies each and every allegation contained in Paragraph XV of said answer, save and except only such as therein admit the allegations of the bill of complaint.

XII.

Denies each and every allegation contained in Paragraph XVI of said answer, save and except only such as therein admit the allegations of the bill of complaint.

XIII.

Denies each and every allegation contained in Paragraph XVII of said answer, save and except only such as therein admit the allegations of the bill of complaint.

XIV.

Denies each and every allegation contained in Paragraph XVIII of said answer, save and except only such as therein admit the allegations of the bill of complaint.

XV.

Denies each and every allegation contained in Paragraph XIX of said answer, save and except only such as therein admit the allegations of the bill of complaint.

XVI.

Denies each and every allegation contained in Paragraph XX of said answer, save and except only such as therein admit the allegations of the bill of complaint.

XVII

Denies each and every allegation contained in Paragraph XXI of said answer, save and except only such as therein admit the allegations of the bill of complaint.

XVIII.

Denies each and every allegation contained in Paragraph XXII of said answer, save and except only such as therein admit the allegations of the bill of complaint.

XIX.

Denies each and every allegation contained in Paragraph XXIII of said answer, save and except only such as therein admit the allegations of the bill of complaint.

XX.

Denies each and every allegation contained in Paragraph XXIV of said answer, save and except only such as therein admit the allegations of the bill of complaint.

XXI.

Denies each and every allegation contained in Paragraph XXV of said answer, save and except only such as therein admit the allegations of the bill of complaint.

XXII.

Denies each and every allegation contained in Paragraph XXVI of said answer, save and except only such as therein admit the allegations of the bill of complaint.

XXIII.

Denies each and every allegation contained in Paragraph XXVII of said answer, save and except only such as therein admit the allegations of the bill of complaint.

WHEREFORE, the complainant prays for the relief demanded and prayed for by him in his bill of complaint herein.

McALLISTER & UPTON and
HENRY ST. RAYNOR,
Solicitors for Complainant.

[Endorsed]: Reply. Filed Jul. 2, 1913.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 3rd day of Feby., 1913, there was duly filed in said Court, an Opinion, in words and figures as follows, to wit:

[Opinion of the Court.]

(Title.)

ROBERT J. UPTON and HENRY ST. RAY-
NOR, Attorneys for Complainant.

C. R. PECK and C. A. SEHLBREDE, Attorneys
for Defendants.

R. S. BEAN, D. J.

(MEMORANDUM OPINION.)

There is nothing in the record to support the charge of actual fraud made in the bill. On the contrary, the facts clearly show that the sale of the property in controversy by Hall, as attorney in fact for Mrs. Herrmann, was entered into by all the parties connected therewith in the utmost good faith. It was made for four hundred dollars more than the price fixed by Mrs. Herrmann and for its full market value at the time. Several witnesses for the complainant testified that its market value at the time of the sale was in excess of the amount paid therefor by the defendants, and while I think these witnesses intended to testify to what they believed to be the fact, I am constrained in view of the other testimony, to conclude that they were mistaken in the year and had reference to real estate values in 1906 and not in 1905. All the witnesses seem to agree substantially that, from about the year 1900 to the announcement of the prospective building of a railroad from Drain to Coos Bay, and the taking over of the local road by the Southern Pacific Company, there was little if any

movement of real estate on Coos Bay, and especially in the vicinity of the property in question. The announcement of the proposed road from Drain was, I take it from the testimony, in August, 1905, and the purchase of the local road was made in July of the year following. As a consequence of these transactions, and the hoped-for development thereby, and of the entry of the Smith Lumber Company about that time into the business activities of the Bay, there was a marked "boom" in real estate values during the year 1906, and a part of the land in controversy was sold for several times what the defendant paid for it. It was probably this increase in value which the witnesses had in mind and not the values of the previous year. Numerous witnesses, familiar with real estate values, have testified that the property sold for the full market value, and this is apparent from the fact that defendants Sengstacken and Smith contracted for its purchase in May, 1905, but hesitated to pay the entire purchase price although amply able financially to do so, because it was considered a hazardous speculation. They therefore endeavored to promote a syndicate to take title to and handle the property, and it was only after considerable effort and the refusal of several speculators and dealers in real estate to join in the venture that they were able to interest four of their neighbors and friends in the venture. If the property had been worth what complainant now claims it to have been, it is highly probable that Sengstacken and Smith would have readily taken the

entire tract, or in any event they would have had no difficulty in interesting others in the proposition. I take it therefore that the question of actual fraud is out of the case and the only point is the legal effect of defendant Hall's connection with the transaction. Hall was and had been, for several years prior to the sale, the agent and attorney in fact of Mrs. Herrmann, who had formerly resided on Coos Bay, but emigrated to Germany in 1900 or 1901, where she continued to reside up to the time of her death, September 18, 1905.

Mrs. Herrmann, as evidenced from her correspondence, was a woman of more than ordinary business capacity, thoroughly familiar with her property, and Hall, in transacting business for her and especially in the sale of her property, followed her instructions rather than his own initiative. For some time prior to May, 1905, she had repeatedly written him, urging and authorizing him to sell the property in controversy for four thousand dollars. Hall made repeated and diligent efforts to do so but was unable to effect a sale until May 17, 1905, when he contracted to sell the same to defendants Sengstacken and Smith for \$4400.00, half in cash and the balance on time, secured by mortgage. Sengstacken and Smith gave him at the time their joint note for one hundred dollars as part payment on the purchase price, for which he gave them a receipt specifying that it was to apply on the purchase price of the property now in controversy. The transaction was to be completed and the title papers passed when the abstract could be pre-

pared and the title approved.

At the instance of Sengstacken and Smith, S. C. Rogers and J. J. Clinkinbeard agreed to each take a two-twelfths interest in the property, and D. L. Rood and Herbert Rogers each a one-twelfth interest, leaving six-twelfths to be divided equally between Sengstacken and Smith, it being agreed between the intending purchasers that, as a matter of convenience the land should be deeded to the Title Guaranty & Abstract Company in trust for the owners.

On August 30, 1905, the day the sale was to have been consummated and the papers exchanged, Clinkinbeard and S. C. Rogers paid to Hall direct their two-twelfths each of the first payment; Rood and Smith paid their one-twelfth and three-twelfths respectively to Sengstacken to be paid to Hall. Herbert Rogers, however, declined to proceed with the purchase and take a one-twelfth interest in the property, for the reason that he did not deem it a good investment. After Clinkinbeard and S. C. Rogers had paid their proportion to Hall and when Sengstacken went to Hall's office to pay the balance of the first payment, he informed Hall of Herbert Roger's refusal to take one-twelfth of the property and suggested to Hall that he take such interest as a part of his commission for making the sale. Hall declined to do so without first consulting his partner who had an interest in the commission, whereupon Sengstacken paid Hall the balance due except for the one-twelfth interest, and Hall credited Mrs. Herrmann with the entire amount due,

agreeing to look to Sengstacken personally for the deficit, in case he and his partner should conclude not to take the interest offered. At that time the deed had been prepared and signed but not acknowledged. After consulting with his partner and on the following day, Hall informed Sengstacken that they would take the Herbers Roger's one-twelfth interest, and the deed was thereupon acknowledged and delivered. None of the purchasers except Sengstacken had any knowledge of this transaction with Hall until some time after the matter had been completed and deed to the Abstract Company delivered.

That Hall acted in the utmost good faith and with no intention of injuring or cheating his principal is manifest from the testimony. He had been repeatedly implored by her to make the sale, as she represented she was badly in need of money, and he was consequently anxious that it should not fall through. He was in no way interested with Sengstacken and Smith in the original contract for the purchase, and had no idea or thought of taking any part of the property until it was suggested to him by Sengstacken on the day the matter was consummated and after S. C. Rogers and Clinkinbeard had made their payments and the deed of conveyance had been prepared and signed.

Under these circumstances it is clear to my mind that Hall's purchase could not in any way affect the title of the other parties. All of them except Sengstacken were ignorant of the matter until some days

after the same had been consummated. They were in no way responsible for nor parties to Hall's purchase, and should not be affected thereby.

Nor do I think the purchase by Hall is constructively fraudulent or voidable as to him. It is, of course, settled law that an agent authorized to sell property cannot himself become the purchaser without the consent of his principal, and if he does so the transaction is void as it respects the principal unless ratified by him with full knowledge of all the circumstances. The reason of this rule is that the law will not permit an agent to place himself in a situation in which there is a conflict between duty to his principal and his own personal interest, and therefore the fact that in a given case the agent's motives were honorable, and that the result was beneficial to the principal will make no difference if the latter chooses to repudiate the transaction. (Mechan on Agency, Sec. 455-461; *Robertson vs. Chapman*, 152 U. S. 673). But the reason of the rule does not apply in this case. Here the sale was virtually made by Hall to Sengstacken and Smith in May, 1905. At that time it is admitted he had no interest either immediate or prospective in the property and no idea that he would ever acquire one. His duty to his principal ceased at the time of the contract with Sengstacken and Smith, as far as the fact of the sale was concerned. Thereafter there was no conflict between his duty to his principal and self interest in that regard. His subsequent taking title to an undivided one-twenty-fourth was, to all

intents and purposes, a purchase from Sengstacken and Smith or Herbert Rogers, and not from himself as agent of Mrs. Herrmann. The fact that the deed had not been formally acknowledged and delivered at the time cannot change the effect of the transaction, or, in my judgment, bring it within the rule prohibiting an agent from buying from himself, nor the evil to be prevented thereby.

It follows that the bill should be dismissed and it is so ordered.

Portland, Oregon, February 3, 1913.

[Endorsed]: Opinion. Filed February 3, 1913.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 17 day of February, 1913, there was duly filed in said Court, a Decree, in words and figures as follows, to wit:

[Decree.]

(Title.)

This cause came on to be heard at this time and was argued by counsel and thereupon upon consideration thereof, IT IS ORDERED by the Judge and decreed that the bill of complaint herein be and it is hereby dismissed; and that the defendants have and recover of and from the complainant, Christian Herrmann, their costs and disbursements herein taxed at \$397.16 Dollars.

Dated this 17th day of February, 1913.

R. S. BEAN,
Judge.

[Endorsed]: Decree. Filed February 17, 1913.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 3rd day of December, 1913, there was duly filed in said Court, a Statement of Evidence, in words and figures as follows, to wit:

[Statement of Evidence.]

(Title.)

Be It Remembered, That on the 17th December 1912, the above entitled suit came on for trial in the above entitled Court, and that the following statement, contains a statement of the proceedings had in said trial, and a statement of the evidence offered and adduced by the respective parties herein, complainant and defendants, during the trial thereof, to-wit:

At the time of the trial and previous to the introduction of witnesses for the complainant, the complainant asked permission of the Court to amend and was allowed by the Court permission to amend the Bill of Complaint herein so as to embody therein the following allegations, to-wit: That Dora Herrmann and Christian Herrmann, on the 30th day of August, 1905, were the owners also of all the rights, benefits, privileges and appurtenances of, in and to Lot 3, of

Section 36, Township 25 South, Range 13 West, Willamette Meridian in Coos County, Oregon, set forth and described in deed marked "Exhibit D" attached to the Bill of Complaint herein, said Lot 3 being 31.50 acres, and that the said defendant, John F. Hall, included and purported to convey the same in said pretended deed to the defendant Title Guaranty & Abstract Company, Trustee, for the pretended consideration therein expressed, on said 30th of August, 1905.

That at the time of said trial, and previous to the introduction of witnesses on behalf of complainant, it was stipulated and agreed by the respective solicitors for complainant and defendants, as follows:

"Mr. PECK: Upon agreement of counsel, we will stipulate that the second further and separate defense in Defendant's Answer on Page 14, under Paragraph 26, be withdrawn and abandoned. I will say for the information of the Court, that there is some discrepancy in the foreclosure proceedings, and we are willing to abandon this and go to trial strictly on the merits.

Mr. ST. RAYNOR: So you raise no question on the title of this property being in Mr. and Mrs. Herrmann at the date of the execution of the deed by Mr. Hall to the Title Guaranty & Abstract Company on the 30th of August, 1905. Is that true?

Mr. PECK: Yes, sir. We do that for one reason, because at the time it had nothing to do with the transaction, because our attorney examined the title,

and we accepted it. At that time we were willing to stand on the deal as it occurred at that time.

(Testimony of Christian Herrmann, Complainant.)

Whereupon, complainant, to support the issues, took the stand as a witness in his own behalf, and being first duly sworn testified as follows:

Direct Examination.

That he was residing in Hildesheim, Germany, in 1905. Mrs. Dora Norman Herrmann was at that time his wife, they were married on the 8th day of June, 1902; that Mrs. Dora Norman, afterwards Mrs. Dora Herrmann, came to Germany in the summer of 1900, she never returned to the United States after the summer of 1900; that about the 29th day of August, 1905, he received a letter from John F. Hall, dated August 12, 1905, in reference to the property in dispute, commonly known as the Norman tract; a letter from John F. Hall dated August 31, 1905, was received by him about 18 days later; he also received letters from Mr. Hall dated September 28th, 1905—September 29th; October 8, 1905; November 28th, 1905; February 19th, 1906; June 19, 1906; July 30, 1906; September 22, 1906; November 10, 1906; January 19, 1907; May 11, 1907; October 17, 1907; February 18, 1908; March 24, 1908; October 1, 1908; October 15, 1908; November 14, 1908. That these are all of the letters he received from Hall. He does not remember how many letters were received by his wife, Mrs. Dora Norman Herrmann, from John F. Hall prior to

her death. His wife died the 18th day of September, 1905. He nor his wife never received any letter from Hall announcing the sale of the Norman tract prior to the death of his wife. On the day of his wife's death he received a letter from Hall which was dated August 31, 1905.

Said letter was offered and admitted in evidence, marked "Plaintiff's Exhibit 1," and read as follows:

"August 31, 1905.

Dora Herrmann,

Hildesheim, Germany.

Dear Madame:

Enclosed herewith find check for the sum of \$1694.00. We have sold the Holcomb land for \$4000.00 net above commission, and our fee for foreclosing the mortgage. Have taken a mortgage for \$2200.00, payable one year after date, at 6% per annum. Will take payments at any time for \$100.00 and upwards.

We retain a sufficient sum to pay the taxes against that and all other property, together with the cost of abstract, and remit balance received herewith. We have also sold the Blanco property for figures mentioned, \$9,000.00. This will be settled sometime about the middle of next month. We will retain 5% of the purchase price, mail you check for $\frac{1}{2}$ of the purchase price less the 5%, and take mortgage 6 per cent, interest payable on or before two years.

Very truly yours,

Hall & Hall."

Whereupon said witness further testified that he received a letter from Hall & Hall dated August 12, 1905, which was offered and admitted in evidence, marked "Plaintiff's Exhibit 2" and read as follows:

"Hall & Hall

Attorneys at Law,
Marshfield, Oregon.

August 12, 1905.

Dora Herrmann,
16 Sedanstrasje,
Hildesheim, Hanover,
Germany.

Dear Madam:

Enclosed herewith, find check for the sum of \$586.30. We have collected since our last report the following sums of money:—

Herman Hillyer\$40.00, Two and two-thirds
months rent

D. A. Curry 30.00

Ferry & Flanagan.....120.00

C. A. Moore120.00

C. Y. Steckel, stumpage
on logs, taken off of
the Holcomb claim372.06

Total \$682.06 The same

has been disbursed, as follows:—

May 22, Lease from yourself to

Bradbury and Pierce\$2.50

June 2, W. P. Murphy, repairs.... 3.05

June 2, E. O'Connell, nails.....	.10
June 7, Mrs. Reichert attending grave	2.00
June 7, Repairing chimney by ferry	6.00
June 22, A. J. Savage, repairing Check herewith	586.30
Hall & Hall fee.....	31.61
Balance left in our hands.....	49.50

\$682.06

You will observe that we will have \$49.50 left. It will be necessary to take all the money that we can collect for the months of July, August and September to repair the Bldg. If we do not sell it. One of the party who was talking of purchasing has been unable to get his money. If he can collect his money, the building is sold. If not, we will have to take chances on selling it to other parties. The Holcomb claim, I guess is sold. Parties have agreed to take the same, and the abstract is now being made, and unless the parties go back on the bargain, we will be able to close the deal about the 1st of September.

We have been unable to get anything out of Short, and we had to put Bonebrake out, because he went bankrupt. We will have to sue Seeley and Thomas for the amount due on stumpage. Court will meet in September. This report has been delayed a week on account of my being absent from town. We will get a payment from Bradbury about the first of Oc-

tober. There is some railroad talk here at present, but we do not know whether or not it is just a boom or whether it is business, as yet there has been no work done, though there is a good deal of inquiry for property, and we believe that we will get rid of most of your property before the first of October.

Hoping this will be satisfactory, we are, Very truly yours,

Hall & Hall"

Whereupon said witness further testified that neither he nor his wife, Mrs. Dora Norman Herrmann, ever received any letter or letters or any intimation that Hall had sold the property prior to the receipt of Hall's letters dated August 12, 1905, and August 31, 1905; the letter of Hall dated August, 12, 1905, was the first time that Hall had intimated to him or his wife, that the Norman property, sometimes called the Holcomb tract, had been sold. He wrote Hall a letter dated November 8, 1905, in answer to Hall's letters of date August 12 and August 31, 1905, this letter was offered and admitted in evidence marked "Plaintiff's Exhibit 3" and read as follows:

"Hildesheim, the 8th November, 1906.

Mr. John Hall, Marshfield.

I received all your writings from the 12th and 31st August, also those from the 28th and 29th September, 1905. Let me first tell you of the very sad eventment that took place in the month of September. My dear wife was not more able to answer your writings; she

became suddenly ill, suffered a whole month from heart disease. I did all I could to keep her alive but it was in vain; death took her away from me. She died in September. We had a long talk together before she died, over all the affairs of her property in America belonging to her, and charged me to send you, dear sir, her last farewell, hoping and asking you, sir, to do all for me as you did for her, as I am the only heir of her whole fortune, with the same interest which you took in all her affairs. My whole confidence belongs to you, sir, just as it was with my wife, and I declare that I am entirely satisfied with all you did in arranging affairs. I am pleased that the hotel has been sold, and the price indicated in your writing. I hope that you shall be able to bring order in all the affairs still left to be arranged. I am very satisfied also concerning the Holcomb claim that it has been sold. Many thanks for all the trouble you had about those affairs, and to have collected the money from Seeley and Thomas of Oregon. If you should want a certificate that I am the only heir of all the property left by my wife in America, please write me as soon as possible; I shall procure a certificate signed by Court, and send you the deed, and send it to you without delay. To be quite sure that all indications my wife gave me before her death about her affairs left in your hand, sir, please inform me which of the claims not yet sold belongs still to my wife's property, and at what price you think that you could get rid of them.

Many thanks for all the trouble you took in my affairs.

Believe me, sir,

Most sincerely,

Christian Herrmann."

Hildesheim, Sendanstrasje 16."

A letter from John Hall to Dora Herrmann, dated October 8, 1905, was then offered and admitted in evidence, marked "Plaintiff's Exhibit 4" and read as follows:

"Dora Herrmann,

Dear Madam:

Herewith you receive a check for the sum of \$370.00, as payment on account of the Holcomb property and mortgage to examine. J. W. Bennett and his wife have returned from their trip. We hope to receive the money for the Blanco Hotel now soon. We expected reply regarding these matters, but up to date we have received none. Please write us as soon as possible. The bagatelle (matter) about the railroad reported work being ordered, it is not yet running but is announced.

With regards to you,

John Hall"

Whereupon said witness further testified that he did not receive any mortgage enclosed in Hall's letter of date October 8, 1905, (Plaintiff's Exhibit 4) nor was there any indication in said letter as to whom the property was sold or to whom the mortgage was given.

Letter of Hall & Hall to Christian Herrmann of date November 28, 1905, was then introduced and admitted in evidence, marked "Plaintiff's Exhibit 5" and read as follows:

"November 28, 1905.

Mr. Christian Herrmann:

I have received your letter of November 8th and I am very sorry to hear of the death of your dear wife and extend my sincerest sympathy in your bereavement. As regards the property here which yet belongs to your wife, she owns 320 acres timber land, of which 160 acres are timbered land worth about \$1,000 and 160 acres worth \$8,000 to \$10,000, the latter is known as the Sprague claim. Bradbury and Pierce have a contract for the timber at \$1.00 per 1000 feet timber, they have fallen very much timber and will soon have the logs in shape piled up and are waiting until the railroad will take them to the water. Then you have yet of the accounts of the Holcomb land mortgage about \$1,800.00 and from the Blanco Hotel \$8,500.00 to be paid in two years less 5% commission \$450.00 after these deductions \$8,050.00 to be paid you. I have had to ask a Power of Attorney as Administrator of the Estate. As I cannot collect money after I have heard of the death of your wife to which she is entitled. Under our laws the compensation to the administrator are 7% for the first \$1,000.00, 5% for the 2nd, 1,000.00, 4% for over \$2,000.00 and 2% on what the estate is worth.

Please send me a credential which will certify that

you are the only heir, attested by Notary Public, showing that you are entitled to the possession of the estate. If your wife has not left a will, then a certificate showing the correctness that is all which is required. (Adding) we know your wife has yet a claim on a small piece of land on the Bay, others too are making claims on it. I do not know if we will succeed to get something out of that, it is not worth more than \$100.00 even if the land would have been good.

I have to state further that she owns the Blanco Hotel, the one half is payable in cash and the other half a mortgage in one or two years. There was a defect in the description noticeable, we explained the matter in our letter of September 28 to your wife, as you will see from it.

If you can find the written documents which pertain to the Sengstacken claim, please send it to us that we can arrange our objections and find evidences that he cannot Sengstacken us and causing difficulties we had to allow him something to get the matter close up.

Hoping this will meet with your approval.

Yours truly,

Hall & Hall."

Whereupon complainant offered and it was admitted in evidence, a letter from complainant to defendant, John Hall, marked "Plaintiff's Exhibit 6" and read as follows:

"Hildesheim, January....., 1906.

Mr. John Hall,

Marshfield, Oregon.

Dear Sir:

In possession of your esteemed letter of 28 November I first express to you my best thanks for your explicit information.

Enclosed I send you first a Notarial certificate of our marriage and heirs agreements, and second a legal certificate through which I become the legalized heir of my deceased wife, and can take possession of my inheritance without further notice. In Germany I have taken possession already. Any separate power of attorney as administrator of the Estate at Marshfield, you perhaps have no more need for. As you are already in possession of a power of attorney from my deceased wife, and as my wife has died, that Power of Atty. goes over to my person alone, through it the unnecessary high costs will be avoided as such are mentioned by you.

Naturally you must know best what is necessary to represent my interests and I therefore place my whole confidence at your command. Hoping that the two enclosed certificates to adjust and regulate my claims (estate) will suffice. What you state regarding the Estate there, it about agrees with those of my deceased wife's. When will the fallen logs ready be to be taken by the railroad to the water, is the railroad not yet built? Through whom are the logs being scaled each time so that they do not count a shortage

to me?

You will oblige me very much if you always would give me a clear report over everything, as I do not understand the conditions and customs there at all, and it is very hard to find my way and to express myself, when you send me to short abbreviated reports (statements). If you could get something yet out of the (Bay Strands) it would please me very much. Specially since my wife had made certain claims good on this piece of land and that its value is \$500.00 at the very lowest.

Now, concerning the Hotel property, I am sorry that the matter has not been amicably settled yet. No agreement regarding the claims of Sengstacken can be found here, and my wife told me that Sengstacken had no claims, and that the matter was fully settled. Should Sengstacken make any kind of claim, then let him first show you his proofs for it. For had he really a legal claim, then he should have presented it after the death of John Norman, when his will was being probated. Considering all I could pay no sum for Sengstacken's release at present yet. But you will know and find what should be done to conserve my best interests, as I would have to conserve energetically the value of my interests, appeal to the German Consul there. How does it really stand with the rental from the Blanco Hotel for the months of July, August and September, as the Hotel first was sold on October 1st, I should yet receive the rentals. You have surely not used these receipts or parts for

the repairing of the Hotel. Such act would absolutely not meet with my approval as the Hotel stood for sale at the time. Pray for more explicit reports to give me some kind of a clear view point of the condition existing. I kindly ask you to send me a sworn affidavit of the contracts concerning the sale of the Holcomb lands, and of the Blanco Hotel property, likewise I would like to have a look at the contracts with Bradbury & Pierce.

Hoping that you can comply with my wishes in every sense, I remain,

Yours truly,

Chrs. Herrmann."

Whereupon complainant offered and it was admitted in evidence, letter dated February 19, 1906, from Hall & Hall or John F. Hall to Christian Herrmann, marked "Plaintiff's Exhibit 7" and read as follows:

"February 19, 1906.

Mr. Christian Herrmann:

Replying to your letter we will say that we have received the certificate. Under our laws the greatest weight which the certificate would give would be to declare you through a will and before we can take possession of any kind have you here first put under a Court's supervision. I suppose, though, by this certificate that under the German laws the signature and affidavit of the Counsel are sufficient. Here under our laws they would not suffice. Before the estate has any representative you cannot make a claim for it.

The documents testify that the estate stands in the name of your wife. Therefore it is necessary to have a superintendent or administrator named. The man who bought the Blanco property refuses to pay out any more over the \$500 already paid when your wife died, until a representative appointed is who will have power to manage the property and to accept the money.

With reference to the timber land, the contract has been signed before your wife died. The people have now commenced to fall the timber and much logs ready for the railroad to deliver. According to information given me the rails are ready to be laid, and you may at the beginning of summer, we will say by July, accept payment for the logs. Concerning the small piece of land on the river (bay) we will try to get all out of it possible, but we do not believe that we can get \$500.00 or near that sum. We will follow your instructions regarding it.

We have received \$4000.00 for the hotel property and send you hereby \$2000.00 of it. Under our laws we are not required to pay the money out until six months after the legal manager has been appointed, but as we know that you are the only heir and that your wife has left a considerable sum of money besides the sums which is already drawn in (collected) to be paid you later, we thought that we could send you this sum now over.

I do not know (if) whether your wife had an affidavit over the hotel or not from Sengstacken. Mr.

Crawford, the former attorney of this place told us that a written one had been made. We have it not in our possession and do not know who has it. The records show that Sengstacken claims one-third of the 20 feet of the South side of the boundry. This we did not know until the sale had been made and we examined the title. You understand that we do not name your wife's attorney until after this transaction of Mr. Norman's property included was settled, and we had a chance to test the legal claims of your wife with the exception of one sale made. Mrs. and Mr. Norman had an attorney named Mr. Gray, now dead, and this Mr. Gray conducted the business very carelessly up to now. Each parcel of property that went through his hand had a defective title. No doubt your wife has told you of the defects of the title of the Holcomb property, and now we find the same in the Blanco property. The Blanco property did not belong to Mr. Norman's estate but to that of your wife. Sengstacken has made no direct claim to the Blanco property, and it may be that Mr. Swanton, the buyer, will accept the property without the signature (the lease) of Sengstacken, as your wife had possession of it more than twenty years of the ownership. We enclose too an inventory and copy of the record books inventory, both ready and undersigned by the attestor of our county. The appraisers of the estate, J. W. Bennett, is the President of the Flanagan & Bennett Bank of this place. Mr. Bradbury is one of the first timber dealers of the former company. John S. Coke,

Jr. is the President of the First National Bank, former Senator of Coos and Curry Counties. We are convinced that their judgment as to the value of your estate is as good as any one in the whole country could be estimated (or appraised).

Concerning the receipts, rentals of the Blanco hotel, we will say that we have the rents for July and August. Mr. Swanton has for September. In July we have had no repairing done on the hotel.

At the last settlement with your wife we had a balance of \$49.50. The following is to your credit: Rents, Herman Hillyer, \$15.00, \$80.00, \$80.00, \$15.00 and \$3.00. July \$193.00 Balance \$49.50. Recapitulation \$242.50. Of this sum we retain for commission taxes for 1904, \$53.50. You will notice from the inventory that we have yet cash on hand the sum of \$189.00. We will always send you a legal copy of the Court proceedings. Our probate requirements of the estate concerning the Holcomb property contracts are hereto attached. We take a mortgage for later payments. We attach hereto a copy of the accounts together with endorsements of the same. The contract for the Blanco hotel calls for for \$9000.00. Cash down \$4500. Balance and mortgage with 6 per cent. interest payable two years after date first September, 1905. It may be that we will receive the money sooner. We would be very glad over a visit from you, but I do not believe that it would make any difference in your matters. We would be glad to see you yourself here if you could come yourself, make an in-

spection of the property and see how your matters has been settled.

P. S. Marshfield, August 30-05.

\$2200. In one year after date promise the Title Guarantee & Abstract Company, a corporation fully organized and existing by and under the laws of the State of Oregon, to pay the sum of \$2200.00 to Dora Herrmann or order at Marshfield, Coos County, Oregon. \$2200.00 in gold coin of the United States of America according to the present gold value in the event of a deal negotiated this amount or a part thereof drawn in by the Company promises for, and it is understood in addition to the costs and expenses through the Court's costs, Borrowed the additional sum shall be of the same gold standard together with the attorneys fees in the same manner as Court may find it just and right to allow.

Inventory in cash \$189. By mortgage of the Abstract Company \$2200. total \$2389. The statement contains the following inventory, received by draft the 7th 11th, 1905, \$376.12. Trust Company on a mortgage on the N. E. quarter and the interest the W. half of the S. E. quarter section 36 in Tp. 25 S. of R. 13 W. of the W. M. 1364.34. Account of the Blanco of Bennett Swanton for the purchase price of part 7 and 8 and the Easterly 20 feet of the part block 16 and known as Hall's North Marshfield survey Hall's plat for E. B. Dean and N. W. of Section 12 Tp. 25, 8500. Southerly part westerly 800. Inherited property a total \$10533.34. Grand total value belonging to

the named estate \$16433.34.”

Whereupon complainant offered and it was admitted in evidence a letter from Christian Herrmann to John F. Hall, which was marked “Plaintiff’s exhibit 8,” the following portion of said letter was read in evidence and is as follows:

“Hildesheim, February-March, 1906.

Mr. John F. Hall,

Marshfield, Oregon.

Dear Sir:

Now you can deal for me as you have for my wife and accept the money. I hope that now all will soon be in order with the logs.

Concerning the small piece of land, do try to get as much as possible out of it when selling the same; I received the \$2,000. Thank you, I can find no affidavit from Sengstacken among the papers of the estate of my wife which she left me as I found them. Concerning me please try to arrange the matter with Sengstacken so that he can have no further claims whatsoever. I hope that Mr. Swanton will take the property without the signature of Sengstacken, since you tell me that my wife had more than twenty years possession of the property. Thank you very much for the inventory. I have through it a complete overseeing over my estate there. In it I am much pleased. My wife spoke often over the mistake which Gray had made in the managing of the property. It is

really too bad that Mr. Norman did not take more care in his business managing.

Dear sir, wholly according to pleasure and in mine interests, I give everything trustfully into your hands, as now. All herewith is arranged and I have my matter vouchsafed in the hands of my manager and attorney who possesses my whole confidence. I believe it will not be necessary to undertake the great voyage over there, all will be well carried out through you to my full satisfaction."

Whereupon Complainant offered in evidence letter from Hall to Complainant Herrmann, dated June 20, 1906, which was received, marked "Plaintiff's Exhibit 9," and read as follows:

"(Managers)

First Report.

June 20, 1906.

My dear sir:

Hereby you will receive a draft for \$3000 as also a general report in the matter regarding the estate of your wife. Will send the report of the estate tomorrow morning in and a close detail will be made the 2nd Monday in September. Naturally according to our laws are we not obliged without special order to pay out anything, yet as you are the sole heir, we have decided to send you advance sums in accordance with our former payments, and will send you the balance as soon as the order arrives. We will send you some money in July. Pierce and Bradbury have delivered logs and \$500 will stand to our credit July 1st. We will make monthly payments of these sums. The saw

mill Co. to whom the logs being sold will each month between the 10th and 20th make payments. I also inform you that I have been elected County Judge, and on the first of July will officiate. This will not prevent me from now, too as before attend to your business matters now, as before.

With regards yours truly,

John Hall.

(Copy) In the matter of the estate of Deceased Dora Herrmann, through the Honorable L. Harlocker, County Judge of Coos County, State of Oregon.

John Hall delivered herewith the named report as administrator of the above named estate.

Receipts M-1-14.2. 06.

Inventory	\$ 189.00
Bennett for Hotel	8500.00
“ “ Interest.....	191.25
	<hr/>
	8880.25

Paid out court costs.....	\$ 20.00
Inheritance certificate	5.00
Check to Chrs. Herrmann....	2000.00
Advertising	10.00
John Hall Commission.....	234.34
Clerks fee Recording	1.70

	Crdts.	Debts.
I Hacker Abstract	22.00	8880.25
Hall	450.00	

Chrs. Herrmann	3000.00	3137.25
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5743.01

(By total see footing on
last page)

\$5743.01

By balance in hands of ad- ministrator	3137.24
-------------------------------------------------	---------

8880.25

to this is to be added the real estate in the hands of administrator to the above mentioned cash money estate belongs a mortgage signed by the Title Guarantee Co. Abstract business at Marshfield, Ore.; there is of 30 August too the sum of..... 1864.34

and interest at 6% which from

date amt. to	93.00
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Capital interest from the mortgage

from June 30, 1906 amounts to \$1957.54 property cost and interest the sum of 5094.25

it is to be noticed that the named real estate is estimated conservatively \$800.00

called the Woodworth land

Timber Land the Sprague claim 5000.00

Samm piece land at Marshfield 100.00

I could possibly get the following 5900.00

be added and with all appraised to have of the real estate

\$ 10.00

Inheritance Tax	11.75
Halls services	454.75
	5.00
	6.00

\$487.50

After administrator has had all outstanding paid expense and for other incidental expenses remaining yet for your disposition \$2,649.74. Hereto has with interest real estate that the sole heir of deceased Chrs. Herrmann is the husband of deceased _____ year, at Hildesheim, Germany resided, is the age of 69 years and as the administrator believes and accepts he is entitled to view the whole estate of deceased as his property. He gives no claims against named estate except the payments for the administration and inheritance tax already mentioned above, that the named estate is found in a state of good management and the payments of the same. The administrators asks this Court to set a time to hear this report and closes segregation over same as for other further orders against those we can bring."

Whereupon complainant offered in evidence letter of defendant, John F. Hall, to complainant, Christian Herrmann, dated October 18, 1907, which was admitted in evidence, marked "Plaintiff's Exhibit 10" and read as follows:

"18 October, 1907.

Mr. Herrmann:

In answering your letter of 7-8-07 and at the same

time of 8-9-07, I inform you that you appear to still own the following estate in Oregon:

Namely. A mortgage for \$1664.34 with interest from 30-8-05 at the rate of 6%, this matter has been held up for some time on account a defect which we tried to bring the matter in order. As soon as the title is in order (cleared) up we can collect the interest and possible too the principal sum if they do not pay or settle we will be obliged or compelled to take legal steps and bring suit for the mortgage.

You own besides a 160 acre known as the Sprague claim of which Pierce and Bradbury have bought the timber. The timber is nearly all sold, the land is worth \$5000.00 by a good judgment after the timber is all sold.

The \$800 piece real estate which our letter of 17-7-06 is mentioned was the Woodward claim which was sold some time before your first wife died. That money was sent you on the 22|9.06 \$1140.00. The \$100 piece that we mentioned was sold to Mr. Hacker for \$100 and the money was sent to you with our account of 19|1.07. We see since our sending of P. & Br. 17|7.07 the \$1490.79 and 17|10.07 of the same people \$2155.75, we add a check for \$3464.22. Our commission of 5% amounts to 182.32 the same we retain.

Beginning the next year we will again send you a small payment for logs from P. and Br. we will too send you the result regarding the title as soon as we know how the matter stands.

With

Hall."

Whereupon complainant offered and it was admitted in evidence, a letter from Hall & Hall and defendant John F. Hall, to Christian Herrmann, dated February 18, 1908, marked "Plaintiff's Exhibit 11" and read as follows:

"Hall & Hall

Attorneys at Law

Marshfield, Oregon. Marshfield, Ore. Feb. 18-1908

Mr. Christian Herrmann,

c/o Hildersheimer Bank,

Hildesheim, Hanover, Germany.

Dear sir:

Replying to yours of January 13th will say that we received a 30 day draft from Simpson Lumber Co. a few days ago stumpage from Pierce & Bradbury camp. There will be due you \$984.27. This money will be available in 30 days at which time we will mail you check. The timber is most all logged off and you cannot expect but very little more from that source.

In the matter of the mortgage as we wrote you before there was some dispute about the title, but we have settled by agreeing to allow \$250.00 on the interest and have notified the owners of the land that if they did not pay principal or interest we would begin proceedings in the Circuit Court to foreclose the mortgage. Our Circuit Court meets in April and if the money is not paid we shall commence proceedings.

Very truly yours,

Hall & Hall,
John F. Hall"

Whereupon complainant offered in evidence a letter from Hall & Hall to complainant, Christian Herrmann, dated October 1st, 1908, which was admitted in evidence, marked "Plaintiff's Exhibit 12" and read as follows:

"Hall & Hall

Attorneys at Law

Marshfield, Oregon. Marshfield, Ore. Oct. 1st, 1908

Christian Herrmann,

c/o Hildersheimer Bank,

Hildesheim, Hanover, Germany.

Dear sir:

Replying to your cable will say that we have been unable to collect the money and will have to collect the same through the Court, which will take some little time. We are sorry that this is necessary but it seems the only way to get the money. The party against whom we hold the mortgage promised and still promises, but always fail to materialize.

The property is well worth the sum but it will take some time to settle it in Court.

Yours truly,

Hall & Hall,

JFH|A

Per A"

Whereupon complainant offered in evidence a letter from Hall & Hall, by John F. Hall, to complainant Christian Herrmann, dated October 15, 1908, which was admitted in evidence, marked "Plaintiff's Exhibit 13" and read as follows:

"Hall & Hall

Attorneys at Law

Marshfield, Oregon. Marshfield, Ore. Oct. 15, 1908

Christian Herrmann,

Berlin, Charlottenberg, Kantsopse 44

Dear sir:

Yours of the 27 of July just received. Where this letter has been I do not know. I wrote you some time ago but have not heard from you. I have not received any letters which I did not answer.

As to the mortgage, I will have to foreclose the same, in fact, I have already begun to prepare the papers. There has been no timber cut since we remitted last, in fact, the mills have been shut down the most of the summer. In regard to the party which you speak about he has not as yet arrived in Marshfield, but I will make it my business, if he does arrive, to let others know about him and I am very much obliged for this information.

Hoping this will be satisfactory with kind regards,
I am,

Very truly yours,

JFH|A

Hall & Hall by John F. Hall."

Whereupon complainant offered in evidence letter from Hall & Hall to complainant Christian Herrmann dated November 14, 1908, which was admitted in evidence marked "Plaintiff's Exhibit 14" and read as follows:

Hall & Hall

Attorneys at law

Marshfield, Oregon. Marshfield, Ore. Nov. 14, 1908.

Christian Herrmann,

Berlin Charlottenberg, Kantstrase 44-T'

Dear sir:

Your recent letter just received. In reply will say that the land which the mortgage covers is now under litigation before the U. S. Land Department, and we can do nothing until this matter is settled. We have everything prepared for foreclosure, but there is an attempt made by a party to file a homestead claim on the land. The party who is filing the claim says that the land still belongs to the Government and is contesting the rights of the other claimants. We will hurry the matter up as fast as we can but presume you understand that anything in the hands of the Government Agents moves very slowly, and we can do nothing until after the litigation is settled.

As to the land which has been recently logged off will say that a party offered us \$10 per acre for the same yesterday, that would make \$1590.00 for the claim. The land is said to be coal land, if so the land is worth more than the sum offered, but if it is not coal land, it is not worth the sum offered. We have no way of finding whether or not it is coal land without prospecting. The Beaver Hill coal mine is about a mile from the land, and the Beaver Mine opened years ago and afterwards abandoned joins this land. There has been no logs taken since we last sent you the last money. The hard times have caused the saw mills and logging camps to shut down. But the prospect is that they will begin operating again in the

spring. We have received no money since last remittance.

In case you accept the offer for your land heretofore logged at \$10 per acre, you would have to pay a commission of 5% that would be \$79.50 leaving you the sum of \$1510.50. While we would not advise you to take this offer, we would not advise you not to for the reasons stated above, that is, if the land is coal land, it is worth more, but if it proves not to be coal land, it is not worth that price. The land you call wood land is what we call timber or logged land.

We will inform you just as soon as the U. S. Department office hands down their decision, what the outcome of the litigation may be.

Yours truly,

JFH|A

Hall & Hall."

Whereupon said witness further testified that prior to the time of coming to the United States he had received no information as to whom the Holcomb or Norman property had been sold, other than the information contained in the letters received from the defendant John F. Hall, set forth above; that he first found out the parties to whom this land had been sold by defendant, John F. Hall, after Mr. Clinkinbeard had made an affidavit of the parties interested in the purchase of the property, (See Plaintiff's Exhibit "B" hereto attached and made a part hereof) which was about June 26, 1911.

Complainant further testified that he is not a citizen of the United States but was born in Germnay

and is a German subject and that he has never taken allegiance to any other country; that he first arrived in the United States on the 22nd day of March, 1909, and arrived in Marshfield, Oregon, on the 22nd day of April, 1909; that he stayed in Marshfield until in November of 1909, after which he went to California for five months, then returned to Marshfield and remained there until the 6th day of July, 1911, after which he took up his residence in Portland, where he has since resided.

Complainant further testified that defendant, John F. Hall, did not give him any information in any of the correspondence between them as to whom the property had been sold, except in a letter dated April 19, 1906, which contained a statement about a mortgage given by the Title Guaranty & Abstract Company, and that he therefore, from that time, supposed and believed that the property had been sold to the Title Guaranty & Abstract Company; that he tried to get a statement in the year 1911 from defendant, John F. Hall, as to the affairs between himself and John F. Hall; that he sent Mr. Reigard, his attorney, to ask John F. Hall for a statement from the date of the Power of Attorney from Dora Norman Herrmann and Christian Herrmann to John F. Hall in 1903; that Hall at the end of May or the beginning of June, 1911 gave him a statement covering a period of time from 1905 to 1909 which said statement was admitted in evidence, marked "Plaintiff's Exhibit 15" and read as follows:

“PLAINTIFF’S EXHIBIT 15”

1905

Jan. 1st	Balance	\$ 169.00
Feb. 14th	Bennett & Swanton.....	4000.00
June 18th	Bennett & Swanton.....	4691.25

1906

		\$8860.25
June 21st	Simpson Lumber Co. PB	530.25
July 7th	Geo. W. Beale.....	50.00
Aug. 11th	Simpson Lumber Co. P & B	1829.43
Aug. 23rd	G. W. Beale	1210.00
Oct. 15th	Returned inheritance tax	8.34
Nov. 10th	Simpson Lumber Co.....	1989.35
Dec. 1st	I Hacker	100.00

14578.09

1907

Jan. 1st	Balance brot. for.	1387.37
Jan. 19th	Bradbury & Pierce	1276.02
Jul. 17th	Bradbury & Pierce	1490.79
Oct. 17th	Bradbury & Pierce	2155.75

1905

Feb. 2nd	Copy of translation	5.00
Feb. 20th	Creck—Christian Herrmann	2000.00
Mar. 9th	J. A. Luse	10.00
May 12th	Taxes	234.31
May 21st	J. T. Hall and G. A. Bennett, Commission sale of Blanco	300.00
May 29th	James Watson	1.70
Apr. 19th	Hacker abstract	22.00
Apr. 18th	J. F. Hall	150.00
June 18th	Christian Herrmann	300.00
June 19th	Inheritance Tax	11.75
Sep. 22nd	Check	2543.24
Sep. 22nd	Administrators commission	454.75
Oct. 9th	Inheritance tax	102.50

1906

July 30th	Check & Fee	\$ 530.72
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Sept. 15th	Notice of final report	10.00
Sept. 15th	Sun Subscription	4.50
Sept. 15th	Telephone	4.40
Sept. 22nd	Commission and Ex, Beale	120.00
Sept. 22nd	Check Beale	1140.00
Sept. 22nd	Check Beale Bradbury	500.00
Sept. 22nd	Check fee	25.00
Oct. 12th	Abstract	5.50
Nov. 10th	Check (1889.90) fee (99.45)	1989.35
Dec. 10th	Appraisers fee	6.00
		<hr/>
		13190.72
	Balance for.	1387.37
		<hr/>
		\$14578.09

1907

Jan. 19th	Fee and check	1276.02
Jan. 22nd	Fee (50.00) Check (1000.00)	1050.00
Feb. 19th	Taxes	159.90
Oct. 17th	Check	3464.22
Oct. 17th	Fee (126.67) Expenses (182.32).....	308.99

6259.13

Forward 50.80

6309.93

1908

Nov. 1st—1907	Ford old ledger	50.80
March 17th	Bradbury & Pierce	941.33

1909

Feb. 17th	T. G. & C. Co.	200.00
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\$1192.13

1910

Feb. 4th	Bradbury	163.27
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\$1355.40

1908

March 9th	Taxes	\$ 32.80
March 24th	Check	900.00
March 24th	Fee	47.03
Oct. 3rd	Abstract	12.00

1909

Feb.	17th	Check	100.00
Mch.	9th	Taxes	23.25
Apr.	8th	Check (72.05) fee (5.00)	77.05

1192.13

1910

Feb.	4th	Check (158.27) Fee (5.00)	\$ 163.27
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\$1355.40

Whereupon said witness further testified in substance as follows: That afterwards he asked the defendant John F. Hall for another statement, being dissatisfied with the one furnished and that defendant, John F. Hall, on June 23rd, 1911, gave him a second statement commencing the 3rd day of August, 1905, which statement was introduced and admitted in evidence, marked "Plaintiff's Exhibit 16" and read as follows:

"PLAINTIFF'S EXHIBIT 16"

1905

Aug 3	Telephone .....	.50	Aug. 1	Balance	\$ 49.50
" 31	"	1.50	Aug. 1	Herman Hill-	
" 31	Check	1694.00		yer	15.00
" 31	Fee foreclosure	160.00	" 4	Ferrey &	
" 31	" sale of land	220.00		Flanagan	40.00
" 31	Taxes	126.00	"	D. A. Curry.....	15.00
" 31	Abstract	4.00	"	F. W. Hill-	
" 31	Ree Mort	3.20		yer, rent .....	.50
" 31	Balance on hand	20.00	" 16	Chairs Heisner	3.00
Sept.	Rec. Sheriff		"	J. J. Clinkin-	
	deed	1.80		beard	366.65
"	Telephone		"	S. C. Rogers....	366.65
	Sheriff	1.00		Others	1466.70
" 27	Rec Deed	2.00	Sept. 1	Ferrey Flan-	
" 28	Check			agan	40.00
	(Swanton)	500.00	" 26	C. A. Moore	80.00

" 29	Check	280.00	" 28	Bennett Swan-	
" 29	Hall & Hall....	30.00		ton	500.00
Oct. 4	Sheriff Deeds..	2.00	" 29	Seeley &	
Nov. 7	.....	34.12		Sheridan	300.00
" 7	Check	370.00	Nov. 7	Title Guar.....	376.12
	Balance	169.00			
					<hr/>
					\$3619.12
		<hr/>			
		\$3619.12			

The above is the statement of account of Dora Herrmann between August 1, 1905, and November 7, 1905.

John F. Hall."

Whereupon said witness further testified as follows:

"Q. I notice in here, Mr. Herrmann, in this Plaintiff's Exhibit 16, a statement of J. J. Clinkinbeard, \$366.55, S. C. Rogers \$366.55, and the word "others," \$1466.70. Did Mr. Hall ever explain to you what these items meant?

A. No, never.

Q. Did you ever understand, or were you ever given any information as to what they did mean?

A. No.

Q. And what time was it that you received that Plaintiff's Exhibit 16?

A. In June, 1911.

Q. No, this one, Exhibit 16?

A. 23rd of June, 1911.

Q. And when did you receive Exhibit 15?

A. It would be end of May or beginning of June. I can't say the date exactly.

Q. Of what year?

A. 1911.

Q. And then after the exhibit 16 was received by you, how long was it until you got the affidavit from Mr. Clinkinbeard that is in evidence?

A. I must explain you bye and bye.

Q. What?

A. I must explain you bye and bye. I cannot tell you the date.

Q. No, you can explain to the Court now.

A. After I found this Clinkinbeard \$366.65, Rogers \$366.65, and others \$1466.70, I didn't know what it is; I never got money under those names, and then I figured out. I found the sum of \$2200 that they paid me in cash for this Holcomb land.

Q. What do you mean by that \$2200?

COURT: That is what he said they paid him in cash for the Holcomb land?

A. For the Holcomb land, I got \$2200.00, that is half payment.

Q. In other words, you found these three items in "Exhibit—16", under the head of Clinkinbeard, Rogers and "others," aggregated \$2200.00. Is that what you mean?

A. Yes, sir, I makes addition and find out \$2200.00, and then I make a belief that must be the same \$2200.00, that came to me from the Holcomb land. Therefore, I told Mr. Reigard to make investigation of Mr. Clinkinbeard and Mr. Rogers, what he has to do with this sum that he pay to Hall, and Mr. Reigard telephoned to both, and Mr. Rogers had no time. Mr.

Clinkinbeard came into Mr. Reigard's office, and then make this affidavit.

Q. That is how you found it out?

A. Yes.

Q. And that is the first time—or what was the first time that you discovered that that was the situation in regard to whom this land had been sold by Mr. Hall?

A. After this affidavit.

Q. How much have you received in payment of that mortgage from Mr. Hall?

A. First, \$370.00.

COURT: When was that, Mr. Herrmann?

A. October 8-1905—\$370.00.

Q. What else?

A. I am not finished. This is accounted later on, in a letter February 19-1906 for \$376.12.

Q. How was that accounted for?

A. For mortgage received February 7-1905.

Q. What do you mean by that was accounted for in that item? In what way?

A. I wrote "secured of the mortgage of the Holcomb land."

COURT: Have you the letter of February 19th, the Hall letter?

Q. I do not understand you, Mr. Herrmann. The first item was \$370.00.

A. Yes.

Q. And the one that you refer to in your letter was \$376.12?

A. Yes.

Q. In what way do you bring those two items together, so as to make it the one thing?

A. It said in statement what they give me later on; said letter November 7th, mortgage \$370.00, and here on the right side of the statement, "November 7th, Title Guarantee and Abstract Company, \$376.12."

Q. Is that from the timber that was taken from the land?

A. This is security for the mortgage. It was taken from the Holcomb land for timber and the Simpson Lumber Company give me a statement.

Q. Oh, I see what you mean. You mean it was applied as payment on the mortgage, do you?

A. What is applied?

Q. Applied? That is part payment.

Court: Credited on the mortgage.

A. Yes.

Q. You said secured. I did not understand.

COURT: He meant credit on the mortgage.

A. Credit, yes.

Q. That was an item that came from the money derived from the timber taken off this land, was it?

A. Yes.

Q. When did you find this out?

A. After I got statement from the Simpson Mill in 1911.

COURT: Now, do I understand there were two credits on the mortgage, one for \$370. and one for \$376.12?

A. No, just the one, different counting.

Q. Did you receive any other payment?

A. The next payment I got February 17, 1909, \$100.

Q. From whom?

A. Check from Mr. Hall.

Q. Any other payment?

A. April 8, 1909, cash on hand \$72.05, and keep back for taxes \$23.25, and keep back for commission five per cent—five dollars.

Q. Now did you receive any other payment?

A. No.

Q. On that mortgage?

A. No.

Q. Did you endeavor to secure the payment of it through Mr. Hall? Did you try to get it paid through Mr. Hall—the mortgage? Did you try to get the money?

A. Ask him?

Q. Yes.

COURT: Yes, ask Mr. Hall for the money?

A. Yes.

Q. When?

A. Oh, several letters before. This was due, this mortgage, one year after payment, and then after this letter I asked it always.

Q. Did you ask him personally for it?

A. No.

Q. Now when you came to this country were you able to speak English at all?

A. No, not a word.

Q. Not a word?

A. No.

Q. Now in all of these transactions that you had with Mr. Hall, and permitting him to sell this property, and administer this estate, in fact, all of the transactions that he did for you, how did you come to let him do that?

A. I was very comfortable—I don't know the English—I trust him.

Q. Trust him?

A. I trust him very much.

Q. You reposed what kind of trust in him?

A. In all matters; in money what he received from me.

Q. I mean to what extent? Did you trust him a little or in the whole?

A. No, whole, full.

Q. Full?

A. Full.

Q. Implicit trust?

A. Yes.

Q. Do you understand the word "implicit?"

A. No.

Q. You say you trusted him wholly?

A. I trusted him the same as my brother, in full.

Mr. PECK: That is good enough.

Q. That is enough. Some brothers we don't trust very much. The Court will take judicial knowledge of that. Did you have any other agent in this coun-

try than Mr. Hall at that time?

A. No.

Q. Nobody. Now, did you know anything about the value of this property in August, or previous to August, 1905?

A. Not at all.

Q. Did you have any knowledge whatever of the value of the property prior to coming to Coos County?

A. No, not at all.

Q. Now, whom did you depend upon for knowing the value of it?

COURT: Whom did you trust about the value?

A. What time?

COURT: In August, when it was sold, 1905- It was sold in August, 1905.

A. I trusted Mr. Hall at that time.

Q. Then whom did you trust—Mr. Hall?

A. Mr. Hall.

Q. Did you and Mrs. Herrmann—Mrs. Dora Herrmann have any children?

A. No.

Mr. PECK: We admit the heirship.

Mr. ST. RAYNOR: You admit the heirship that Mr. Herrmann is the sole heir at law of Mrs. Dora Herrmann?

Mr. PECK: And entitled to any rights or property she may have been entitled to.

Mr. ST. RAYNOR: You deny it in your Answer. So it is stipulated that Mr. Herrmann, the complainant, is the sole heir at law of Mrs. Dora Herrmann,

and entitled to all the property rights involved in this suit.

Mr. PECK: That she would have been entitled to.

Mr. ST. RAYNOR: I say you admit her ownership?

Mr. PECK: You said the property rights in this suit. That is the point at issue.

Mr. ST. RAYNOR: I will qualify by saying she was the owner of the property involved in this suit—the real estate. You admit that?

Mr. PECK: We do not. Certainly not. We admit he is the sole heir of all the rights and title she would at this time be entitled to if she were here, but we do not admit she was entitled to the property involved in this suit.

Mr. ST. RAYNOR: I don't mean for you to admit that. But you admit he succeeds to her rights, whatever they are.

Whereupon said witness on cross-examination by solicitor for defendants, testified as follows:

Cross Examination.

Q. Mr. Herrmann, did you know anything about this transaction prior to August, 1905, before this time that the land was sold?

A. Only so far what this letter from August 12, 1908 say.

COURT: 1905.

A. 1905, yes.

Q. And all you know about the transaction from

the time before the land was sold, is what you got from that letter of August 12, 1905?

A. Exactly.

Q. You don't claim to have any other knowledge. You don't claim to know anything else about it?

A. No. That this one sale was made in 1902 to Mr. Sengstacken for \$6,000. That I know.

Q. That was another piece of property?

A. No, the same property—the same property.

Q. That was before the other mortgage was foreclosed. It was the other transaction?

A. I don't know anything from foreclosing the mortgage. I didn't understand what is foreclosing at that time, only I know the same property.

Q. What kind of a business woman was your wife?

A. No business woman at all. She worked always in the house.

Q. Didn't she take care of and look after her business pretty carefully?

A. No, not so much, only for her money.

Q. Didn't she know about the details of her business in America pretty well?

A. Not very well.

Q. Did she keep in touch with her property here in any other manner than through Judge Hall?

A. Oh, yes, she read sometimes the paper.

Q. You subscribed to a paper from Marshfield, didn't you?

A. Every week one I take.

Q. Did she correspond with other people in

Marshfield—did she write to other people?

A. Yes, sometimes to Mr. George Walters, San Francisco.

Q. Did she ever write to her neighbors there in Marshfield any?

A. No, never.

Q. Now, when you came back to this country, how did Judge Hall treat you and act toward you when you came into his office?

A. Oh, he didn't speak anything, only I get the money which belong—this last \$100.

Q. Did he show you the books at that time?

A. No.

Q. Did he give you the papers which belonged to your wife?

A. Yes, was the books, and he gave me all these papers without any explanation.

Q. The papers were in a box, were they not?

A. Yes.

Q. Did you ask for any statement at that time of your—

A. I couldn't. I trusted Mr. Hall and think was all right. I never asked no questions. I am here to make my life.

Q. But you didn't ask him for any statement at that time?

A. At this time no.

Q. Well, at that time you wanted to see some of your properties and look them over, didn't you? When you came at that time?

A. As near as I know what is known as the Sprague claim.

Q. Didn't Judge Hall take you out and find an interpreter at that time, who could talk with you?

A. No, my wife could speak a little English.

Q. Do you remember Judge Hall going out with you and getting Mr. Hagelmaster at that time?

A. Oh, getting Mr. Hagelmaster to speak German?

Q. Yes.

A. Yes.

Q. And you could have found out anything you wanted to from him, couldn't you, at that time?

A. I had nothing to find out. They didn't ask me.

Q. But Judge Hall, at that time, acted fair and open with you in everything, didn't he?

A. Yes.

Q. He didn't look as if he was covering up anything, or trying to cover up anything, did he?

A. After I come in, I know only this, he was red in the face—was astonished, as I know.

Q. Astonished that you came?

A. Yes.

Mr. ST. RAYNOR: You mean surprised.

A. Surprised.

COURT: Red in the face and surprised that he came.

Q. You didn't notice at that time that he was trying to conceal anything from you about your trans-

actions?

A. Conceal?

Q. Trying to cover up anything?

COURT: Hide.

Mr. ST. RAYNOR: Keep it from you.

Q. Trying to keep it back.

A. Oh, no, no. I trusted.

Q. You didn't think of it at that time. He acted fairly with you, didn't he?

A. Yes.

Q. Now when Mr. Reigard asked for this statement, do you know whether he asked for a statement of all of the transactions for your wife and yourself, or only for the transactions that he had with you? (Referring to exhibit 15.)

A. I told Mr. Reigard exactly to ask a statement for the whole time, wherever his Power of Attorney—1903.

Q. Do you know what Mr. Rigard did ask for?

A. I wasn't there.

Q. Then when you received this Plaintiffs Exhibit 16, and you noted this item of "others \$1466.70," did you ask Judge Hall for any explanation of that item at that time?

A. I sent Mr. Reigard to ask about this.

Q. Didn't Mr. Reigard call up Mr. Clinkinbeard and Mr. Rogers about it?

A. Yes, sir.

Q. Do you know whether he said anything to Mr. Hall about it or not?

A. Mr. Reigard.

Q. Yes.

A. I sent him for this. I can't tell you. I was never there.

Q. You don't know whether he did or not?

A. No.

Q. You don't know whether Judge Hall ever refused to explain that item in any way?

A. Refused only to give me more statements; was all that belonged to me.

Q. At the time that the Estate was closed, didn't you get a statement from Judge Hall of his connection with Dora Herrmann affairs?

A. Will you explain more?

Q. When Judge Hall was administrator of the Estate, and when the estate was closed up, didn't he send you a statement of all his transactions, and all the business that he had done with your wife?

A. He sent me a letter from September 22, 1906; he sent me the last money that must come to me, and paper to sign that I have got all what I—what I have to get.

Q. And did that paper show different items of money that he had paid out for this purpose and that purpose?

A. No, no, show only what I have to get.

Q. Now this item of \$370 that you have said was a payment for some logs. Do you know whether these logs were taken off of that claim before or after the date of the sale?

A. After.

Q. Now, then from——

Mr. ST. RAYNOR: Do you understand what Mr. Peck means by the date of sale?

A. After August 30, 1905.

COURT: Taken off after August 30, 1905?

Mr. ST. RAYNOR: Your understanding it is it was taken off after that, is it?

A. To be clear, it was sent to the Simpson mill after the sale—date of sale.

Q. All right. What did you do with this mortgage when you came to this country?

A. I sold it to W. S. Chandler.

Q. You sold it to him in exchange for a ranch—as part payment on a ranch?

A. Yes, sir.

Q. Did you get face value for it?

A. For the mortgage?

Q. Yes the full value? Did you get the full value? Did he give you credit on your deal with him for everything that was coming to you on the mortgage?

A. Yes, except the \$250, what was make deduction on the mortgage.

Q. Now that \$250 was the reduction that was mentioned in John Hall's letter of February 18, 1909, Plaintiff's Exhibit 11?

A. 18th of February, 1908.

Q. 1908, excuse me, he is right. Have you the reply to this letter in your book?

COURT: Answer.

Q. Have you your answer to this letter in your book?

A. Is from 4th of June, 1908.

Q. Now, what do you say in that answer? What did you say in that answer about this \$250?

A. Nothing.

Q. Why didn't you?

A. I didn't understand this.

Q. What is that?

A. I didn't understand this.

Q. Why didn't you ask him for some explanation of it?

A. It was a time where I have to do other things. It was the time I didn't care no more for all that—for this business here. I had so much trouble in Germany, I forget.

Q. You had too much on your mind to say anything?

A. There, yes, and I wouldn't ask him.

Q. Did you ever make any objection to this item to Judge Hall?

A. No.

Q. When you came here and settled up with Judge Hall, did you make any objection to him as to this \$250 item?

A. No. Maybe I believe at this time it was right. I didn't understand anything from business, and therefore, think all Mr. Hall makes was right.

Q. At this time don't you think it was right?

A. Now?

Q. Yes.

A. No.

Q. Why not?

A. If the property is sold and they had the abstract looked over and closed the deal, then they must not make this reduction after this. They must make it before. It was a deal finished.

Q. You gave a warranty deed to the property, didn't you?

A. I don't know. I can't tell.

Q. You gave a deed to the property in which you said you would protect the title. You said the title was good when you gave the deed, didn't you?

A. Ask Mr. Hall. I never gave the deed. I never saw the deed. I ask him in letter to send all copies of deeds and abstracts, and he didn't send me.

Q. Did you ever ask Mr. Hall who the owners of this property were?

A. This Holcomb land?

Q. Yes.

A. Never.

Q. Did you go to Mr. Sengstacken, and ask him for money on this mortgage after you came to this country?

A. I can't remember, but I think; I think I would have this money that I could buy this Chandler ranch.

Q. Did you ask him at that time who owned the ranch?

A. No, I had in mind at this time, you know, the Title Abstract Company.

Q. And the time that you asked Mr. Sengstacken for the money, did Mr. Sengstacken tell you that there was a contest pending? That is that someone had jumped on the claim—some one had tried to take the claim? A man by the name of Kidder had filed a contest against the claim in the United States Land Office?

A. No, I think Mr. Hall wrote me this, or told it to me. I can't tell you exactly. I heard it.

Q. You knew that was the delay, why they didn't pay the mortgage, didn't you?

A. I didn't believe that this has anything to do with the mortgage.

Q. Well, you understood that they claimed—that they said they didn't want to pay the mortgage, because the title wasn't good?

A. No.

Q. Didn't Mr. Sengstacken tell you that he couldn't pay that mortgage at that time, because someone had tried to get the land—a man by the name of Kidder, in the United States Land Office?

A. No, he had not money to pay me.

Q. He didn't say anything about Mr. Kidder—

A. I don't know.

Q. —trying to get the land?

A. I don't believe it. I only know what Mr. Hall wrote me.

Q. How long did you have possession of this mortgage before you turned it over to Mr. Chandler?

A. From 30th of August, 1905, till 12th of April,

1909, was the day I turned it over.

COURT: When did you get the mortgage itself?

A. I never got it in my hand.

COURT: Never got it in your hand?

A. Never saw the mortgage, only I saw a copy.

Q. Where did you see the copy?

A. What?

Q. Where did you see the copy of the mortgage?

A. Why I see?

Q. Where? Who had the copy? You say you saw a copy of the mortgage. Where did you see a copy?

A. Mr. Hall sent me a copy.

COURT: Did you have the note?

A. There is no note.

COURT: Was no note?

A. Mr. Hall had the note.

Q. When did he send you a copy of the mortgage?

A. It is letter 19th of February, 1906.

Q. Mr. ST. RAYNOR: Now, will you read what you call a copy in your letter there? He doesn't understand that.

A. Copied from the mortgage, Marshfield, August 30, 1905, \$2200. Payable one year after this date; Title Guaranty & Abstract Company, a corporation.

Q. What is that German word right after the Company?

A. (In German)—not translated.

COURT: Now as I understand, Mr. Herrmann, Mr. Hall in February, 1906, sent you some papers?

A. Yes, sir.

COURT: And among others was a copy of a note, was it?

A. Was it the note—was it the note? Yes.

COURT: Note or mortgage, whatever it is, and you had it translated into German and wrote in your book?

A. Book.

COURT: And that is the German translation you are reading from now?

A. Yes, sir.

COURT: Where is the paper, Mr. Hall sent you, do you know?

A. All my papers burned, only I lost not the last letter.

Q. Did you ever ask Judge Hall for any further evidence of that mortgage? Did you say "I want to see more of that mortgage?"

A. No.

Q. Now, where did you get the mortgage, when you turned it over to W. S. Chandler?

A. I never got the mortgage, not to turn over. Deed, finished the deed to the Chandler ranch the 12th of April.

Q. Where did you get it? Who gave the mortgage to you?

A. Nobody.

Mr. ST. RAYNOR: You say 12th of April. What year?

A. 1909, when I got here.

Court: You say you traded it to Mr. Chandler?

A. Yes.

COURT: What did you give Mr. Chandler when you made the trade?

A. Oh, my agent made it, I never saw anything. I didn't understand you see.

Q. Who was your agent?

A. Mr. Stuttzman, a lawyer. I don't know.

Q. Did Mr. Stuttzman have the mortgage?

A. I don't know. Maybe Mr. Sengstacken gave him.

Q. Didn't you ever put your name on that mortgage?

A. I don't know.

Q. Didn't you ever put your name on a note?

A. Yes, on one note that I did buy the Chandler ranch—the price.

Q. And when you turned this \$2200 note over to Mr. Chandler didn't you sign it?

A. I don't know.

Q. Did you ever have that note?

A. I never seen it.

Q. When you came over here?

A. No.

Q. Who did have it?

A. I don't know. I believe Mr. Hall.

Q. Did Mr. Hall give you your papers when you came in the office that time?

A. All the papers was ready.

Q. He never gave you any papers after that time?

A. Yes, gave me a deed and abstract from the coal land. First, I was there and asked him, and he never find it, and his brother find it, and then Mr. Hall came in and told this girl that was in—

COURT: Stenographer.

A. That gave the letters there.

COURT: That is, deed and abstract?

A. Yes, from the coal land, the other part.

Q. But you don't know who did have that note?

A. No.

Q. After you came back to this country?

A. No.

Q. At any time has Judge Hall ever refused you any information about your property, your business, since you have been in this country, you personally, I mean?

A. Unhhuh. (An affirmative grunt).

COURT: Did Judge Hall ever refuse to tell you—you understand the question?

A. Yes, sir. Only last time I wrote one letter to him.

Q. When?

A. I can't tell you the date. Maybe 29th of last month.

Q. Since you began this suit?

A. Yes, this was; to make an investigation; I never asked him about this. I never asked him about this suit; to make an investigation.

Q. Do you know whether or not that mortgage and note was in that tin box of papers that Judge

Hall turned over to you when he settled up with you?

A. No.

Q. Do you know whether or not it was?

A. No.

Q. Was it or was it not?

A. I can't tell.

Q. You can't tell. All right.

A. I don't know, but if it was there, I couldn't tell is it the note or is it not the note. I didn't understand anything.

COURT: Could you read or write English at that time?

A. Nothing, not a word.

COURT: So you didn't know what papers were in the box?

A. No, sir.

Q. Did you give to Mr. Stuttzman or Mrs. Stuttzman, or to the firm of A. H. Stuttzman & Company, a contract and option on this property since the beginning of this suit, in case you should win it?

A. I never give option. I know I give option. I know, but I can't explain.

Q. What was the date of that, do you know?

A. I think 1911, in the summer.

Q. After you began this suit?

A. No, we started the suit in the summer. It was when making investigation.

Q. It was when you were making investigation?

A. Yes.

Whereupon said witness on Re-direct examination,

testified as follows:

Redirect Examination.

Q. Mr. Herrmann, when you speak of receiving a copy of the mortgage from Mr. Hall, do you mean the copy that is referred to in Plaintiff's Exhibit 7, which you have read as being \$2200?

A. Yes.

Q. That you read?

A. Yes.

Q. That is what you meant by the mortgage was it?

A. Yes.

Q. That was the note, wasn't it?

A. Yes, it was the note.

Q. Did you ever receive a copy of the mortgage in that letter?

A. No.

Q. How?

A. No.

Q. COURT: What is that, the letter of February 19, 1906?

A. Yes, sir.

Q. Now, in one of your letters to Mr. Hall, you said that you requested him to send you copies of all of the papers in regard to these matters?

A. Yes.

Q. In response to that, did he send you any copies of any papers?

A. No.

Q. Any contract?

A. No.

Q. Any mortgage?

A. No.

Q. Or any other papers relating to this property at all?

A. No.

Q. When you made this trade with—Mr. Chandler, was it?

A. Chandler, yes sir.

Q. Did you then know anything about the facts of this transaction, that Mr. Hall had not sold this property to the Title Guaranty & Abstract Company?

A. No, not at all, nothing.

Q. Did Mr. Hall at any time ever tell you that he had obtained a share or an interest in this property?

A. No, never.

Q. Did he ever tell you at any time that he held or owned an interest in it?

A. No.

Q. Either by letter or otherwise?

A. No.

Q. Did anybody else ever tell you?

A. No.

Q. Up to the time you got this—

A. Affidavit.

Q. —Affidavit?

A. Yes.

Q. How?

A. Never before.

Q. Did he at any time notify your wife by letter that he had reserved an interest in it?

A. Never did.

Q. Did you ever know that Mr. James T. Hall had reserved any interest in it—Mr. Hall's partner?

A. I didn't know it.

Q. When did you first find that out?

A. Same time.

Q. What time?

A. After making affidavit.

Q. After Mr. Clinkinbeard made the affidavit?

A. Affidavit.

Q. When was it that Mr. Hall first wrote to you that someone had made a contest of this land? Was it before or after the mortgage was due?

A. What do you mean—contest?

COURT: When somebody claims the land.

Q. Claimed the land.

A. Oh, I never knew that somebody claimed the land.

COURT: Mr. Herrmann, there is one letter here that you received from Mr. Hall, in which he said that somebody had filed on the land; there was a contest in the land office about it, and he couldn't core-close the mortgage until that was disposed of. You remember that, don't you?

A. Yes, sir.

COURT: That is what Mr. St. Raynor means.

A. One letter that is here. Letter from November

14, 1908.

Q. 1908?

A. Yes, sir.

Q. November?

A. November 14, 1908.

Q. Then that was more than two years after the note and mortgage was due, was it?

A. Two years after.

Q. Did he ever intimate to you before that that there was any reason why the mortgage should not be paid? What I mean is, did he ever make any statement to you before that?

A. Yes, sir, told us a defect in the title.

Q. Defect in the title, when was that made?

A. October 18, 1907.

Q. 19 what?

A. 1907, October 18, 1907.

Q. Was that the first intimation that was made to you that there was anything—any reason why the mortgage should not be paid?

A. Yes, sir.

Q. I will hand you Plaintiff's Exhibit 1, and ask you if that is the letter in which the reference was made as to the mortgage not being paid—as the reason why it was not to be paid? If that is the one you refer to?

A. No, that is not the letter. That is \$250.

Q. For the \$250?

A. Merely the deduction.

Mr. PECK: There were two.

A. The other letter, October 18th, here it is—17th.

Q. I will put into your hands Plaintiff's Exhibit 10, the letter of October 18th, 1907; was that the first intimation that you received from Mr. Hall—contained in that letter—that the mortgage could not be paid on account of some dispute about the title?

A. Yes, sir.

Mr. PECK: Is his answer to that letter in evidence?

Mr. ST. RAYNOR: Have you the originals here, Mr. Peck?

Mr. PECK: No, we haven't.

Mr. ST. RAYNOR: Or the letter press copy?

Mr. PECK: No, only for the given period. Mr. Hall didn't think that this letter matter was competent. He has all before the transaction. If this is a copy of his answer, I think we want that in evidence here. We want this answer in, please.

Mr. ST. RAYNOR: That one that is here?

Mr. PECK: Yes, that is the answer to this letter. We would like the answer in evidence.

Mr. ST. RAYNOR: I have no objection to that. Do you want to introduce it?

Mr. PECK: Well, you put it in as it belongs to your exhibit.

Mr. ST. RAYNOR: We offer this letter at the request of the defendant.

Letter marked "Plaintiff's Exhibit 17" and read as follows:

"9|11|07.

Mr. John Hall,
Marshfield, Oregon.

In possession of your pleasant writing of 18|10|07 I extend my best thanks for your friendly information about my estate over there, and for sending me the check for \$3464.22 that money came very opportune, and I will be glad when the mortgage matter will quickly be settled.

Concerning the 160 acres known as the Sprague claim, I would like that you after the timber has been sold, the land as coal and not to rent it without having my approval (or consent) as I contemplate to either next fall myself inspect the land, or through some expert have it carefully prospected and have it appraised and first myself organize a Co. that the coal land can be profitable used or (utilized). Should you find a company before that would interest itself for the matter I would after you had me sufficiently acquainted self understood give you the preference in the pleasant hope that you too in this proposition as heretofore will represent my interests and I—— will again here from you.

I remain with best greetings,

Your, Chr. Herrmann."

Whereupon the following proceedings were had and stipulations entered into in open Court between complainant and defendants.

Mr. PECK: These original deeds are admitted in the pleadings.

COURT: You mean the deeds given by Hall to the Abstract Company.

Mr. PECK: Yes, sir.

Mr. UPTON: I would like to read that part referring to the right of way over Lot 3, (Plaintiff's Exhibit 20.)

COURT: You can read that part if you want to.

Mr. UPTON: After describing the property: "Also all mines, veins, seams and beds of coal and other minerals whatsoever found or which may be found upon or under the lands described as lot number three in section 36, in Township 25 South of Range 13 West of Willamette Meridian in Coos County, in the State of Oregon, with full liberty of ingress, egress and regress at all times with or without horses, cattle, carts and wagons for the purposes of searching for, working, getting or carrying away the mines and minerals and with full liberty to sink, drive, make and use pits, shafts, audits, air courses and water courses and to erect and set up fire and other engines, machinery and works and to lay railroads and other roads in, under and over any part for conveniently working said mines and minerals, and also to use any surface of said land for depositing water and other substance which may be gotten from said mines, and do other acts and things necessary for working and getting the mines and minerals according to the most approved practice of mining in the district, and also the right to make and construct logging roads and other ways over and across said lot three as may be

necessary for the purpose of logging off the timber standing, lying and being on the west half of the southeast quarter and lot numbered two of Section 36, in Township 25 South of Range 13 West of Willamette Meridian, from and off said last described land to the navigable waters of Isthmus Slough; also the right to build, construct and use a railway, tramway or other way as may be necessary for the purpose of carrying away all veins, seams and beds of coal or other mineral found in, upon or under the lands above described, and not sold by these presents, to the navigable waters of Isthmus Slough; Also the right to place, deposit and heap upon such portion of said lot three as may be convenient for that purpose which may be taken from any mines which said grantee, its successors or assigns may work on the west half of the southeast quarter and lot two of said land, together with the perpetual right of way over and across the lands granted and conveyed for all purposes whatsoever to and from the west half of the southeast quarter and lot two of said section 36, to the navigable waters of Isthmus Slough, said right of way to be the width of thirty feet and located on the best and most practicable route, provided the said grantee, its successors and assigns shall be actuated by a due regard to the rights of the owners of the land of said lot three, and locate such right of way in such manner as to injure as little as possible the owners of said lands in the enjoyment of their rights in the land and yet accomplish the purpose and object of the herein-

before and hereinafter grant; also, hereby granting unto said grantee herein, its successors and assigns, the right to build, erect and use a tramway from said lot three connecting with the right of way aforesaid and passing over and across the boom of E. B. Dean & Co., in front of said lot three near where what is known as the old Davis coal house was located, and also the right to build, erect and use a wharf and bunker outside of the said boom at the end of the said tramway, provided, that the span shall not be less than thirty-two feet in width so as not to interfere with the passing of logs to and from said boom. This deed and conveyance, besides conveying to the said Title Guarantee & Abstract Company, trustee, and to its successors and assigns the whole and complete title to the said lot two (2) the northeast quarter and the west half of the southeast quarter of said section 36 is intended to convey and set over to the said Title Guarantee and Abstract Company, trustee aforesaid and to its successors and assigns all the rights, privileges, interest, property and authority reserved by deed given by John Norman and Dora Norman his wife to E. B. Dean, David Wilcox and C. H. Merchant, partners as E. B. Dean & Co., dated October 18, 1884, and recorded November 18, 1884, in Book 13 of record of deeds for Coos County, State of Oregon, at page 441 thereof, and also the rights, property, interests, privileges, liberties and authority granted by deed given Elisha B. Dean and Jeanette W. Dean, his wife, David Wilcox and Mary Ann Wil-

cox, his wife, C. H. Merchant, and Mary L. Merchant, his wife, to John Norman, dated November 5, 1884, and recorded November 18, 1884, in Book 13 of Record of Deeds for Coos County, Oregon, at page 438 thereof, together with all rights, privileges, license, property and authority we or either of us may have in, to or connected with said property (lot three and the tide lands abutting thereon and the water front thereto) or any part thereof, obtained or reserved by said reservations in said deeds and by said deeds or had or obtained from any other source or by any other manner whatsoever, together with all and singular the tenements", etc.

Mr. ST. RAYNOR: Now, Mr. Peck, I suppose you will stipulate so as to avoid the necessity of having to make the title proof, that at the date of this deed of August 30, 1905, Mrs. Dora Herrmann owned all these rights set forth in this deed in and to Lot 3 described herein.

Mr. PECK: As stated this morning, we will not set that up as a defense in this action, but we do not admit that fact so as to prejudice us in making the claim that the \$250 paid was a legitimate compromise and settlement.

Mr. ST. RAYNOR: That is not what I mean by this stipulation. What I mean by that, is that you will stipulate that at the date of the deed, August 30, 1905, Mrs. Dora Herrmann owned all these rights in and to Lot 3 that are described in the deed from Dora Herrmann and Christian Herrmann, by their Attor-

ney in Fact, John F. Hall, to the Title Guaranty & Abstract Company.

Mr. PECK: This was not an original draft of a deed on the part of John Hall. Wasn't this a copy of a deed before that time of the Deane Company to Dora Norman?

Mr. ST. RAYNOR: Perhaps you don't understand what I mean. The idea is here, if the Court please, we contend that all of these rights were reserved and vested in Mrs. Norman, that are expressed as having been conveyed in this deed to Lot 3; all this right to the water front, and these different easements and other benefits and privileges, incident and pertinent to the land. Mrs. Herrmann owned them at that time, and her attorney in fact, Mr. Hall, purported to deed them to the Abstract Company. All we want is a stipulation so as to obviate the necessity of making that title proof—that that right was vested in Mrs. Herrmann at that time.

Mr. PECK: We will admit that John Norman and Dora Norman, his wife, on October 18, 1884, conveyed the surface of Lot 3 to E. B. Deane, David Wilcox and E. H. Merchant, partners under the firm name of E. B. Deane & Company, reserving just those things which are set out in the Title Guaranty & Abstract Company deed.

Mr. ST. RAYNOR: And at the time of the Title Guaranty & Abstract Company deed, on August 30, 1905, Mrs. Dora Herrmann owned them?

Mr. PECK: I think I made myself plain. I think

the Court understand. I don't want to prejudice my rights.

COURT: You are willing to concede they have not conveyed them in the meantime; that if Deane & Company reserved any rights, they still possess them and conveyed them. You are willing to admit that whatever rights they reserved was still owned and conveyed to the Title Guaranty & Abstract Company.

Mr. PECK: Without prejudicing our claims that the \$250 paid was a legitimate compromise of the defect in the title.

Mr. ST. RAYNOR: But you don't contend that this defect in title arose from the fact that Mr. and Mrs. Herrmann did not own these rights over Lot 3, do you?

Mr. PECK: No, no, we don't consider those rights worth anything.

Mr. ST. RAYNOR: Then you concede they did own these rights over Lot 3 that are passed in this Title Guaranty & Abstract Company deed?

Mr. PECK: I cannot make myself any clearer than I did.

COURT: I understand that he concedes that when Norman made deed to Deane & Company, he reserved certain rights over Lot 3, and hadn't conveyed them in the meantime, and whatever rights they owned in that land, they still own and conveyed to the Title Guarantee & Abstract Company.

Mr. ST. RAYNOR: That would require us to show the Norman deed, your honor. I was trying to

obviate the necessity. I understand what counsel desires to reserve is the idea that there was some defect on account of some foreclosure proceedings subsequently.

COURT: I think we understand that.

Mr. ST. RAYNOR: Which this \$250 is claimed to have settled.

COURT: There is no controversy between you on that.

Mr. UPTON: Mr. Peck, do you admit the quitclaim deed from Smith and wife, Sengstacken and wife, and Z. T. Siglin to the East Side Land Company?

Mr. PECK: I think we admitted that in our pleadings.

Mr. UPTON: And do you admit the quitclaim deed from J. J. Clinkinbeard and wife, S. C. Rogers and wife, D. L. Rood and wife, James T. Hall and wife, John F. Hall and wife and William O. Christensen and wife to East Side Land Company?

Mr. PECK: Yes.

Mr. UPTON: I offer these three deeds in evidence.

Deed Smith, Sengstacken and Siglin marked "Plaintiff's Exhibit 18."

(Note: Plaintiff's Exhibit 18 is the same as Exhibit "D" attached to and made a part of complainant's Bill of Complaint.)

Deed Clinkinbeard, Rogers, Rood, et al, marked "Plaintiff's Exhibit 19."

(Note: Plaintiff's Exhibit 19 is the same as Exhibit "E" attached to and made a part of Complainant's Bill of Complaint.)

Deed Dora and Christian Herrmann to Title Guaranty & Abstract Company to Lot 2, West half of Southeast quarter Section 36, and mining rights, marked "Plaintiff's Exhibit 20."

(Note: Plaintiff's Exhibit 20 is the same as Exhibit "B" attached to and made a part of Complainant's Bill of Complaint.)

Mr. UPTON: Do you admit the conveyance by the Title Guaranty & Abstract Company to the East Side Land Company?

Mr. PECK: Yes.

Mr. UPTON: I offer the deed in evidence.

Marked "Plaintiff's Exhibit 21."

Mr. UPTON: You admit the dedication of the East Side and Home Addition?

Mr. PECK: Certainly.

Mr. UPTON: I offer in evidence the dedication.

Marked "Plaintiff's Exhibit 22."

Mr. UPTON: You admit the conveyance to the East Marshfield Land Company. Of course we are not trying this as to the East Marshfield Land Company.

Mr. PECK: I should like the Court to understand what the purport of that was, so that the Court will understand.

Mr. UPTON: It is merely there as a disputed boundary line, your Honor, between this East Side

property and this Norman property and what is known as East Marshfield, Mr. Douglas property. Mr. Douglas was made a party defendant. That is, the East Marshfield Land Company was, and afterwards we entered into a stipulation in regard to that, that it would not be necessary to have Mr. Douglas appear and contest, as it would be settled in case we win in this proceeding, and this deed I now offer is a Quit Claim Deed from the Title Guaranty & Abstract Company, Trustee, to the East Marshfield Land Company, to that disputed boundry line.

Mr. ST. RAYNOR: It was a dispute of about half an acre.

Mr. PECK: It covers that, but that deed also has to do with the transaction for which the \$500 was paid, hasn't it?

Mr. UPTON: This is the title deed to that disputed boundry line.

Offered in evidence and marked "Plaintiff's Exhibit 23."

(Note: Plaintiff's Exhibit 23 is the same as Exhibit "C" attached to and made a part of complainant's Bill of Complaint.)

Mr. UPTON: We would like to put in this Power of Attorney while it is admitted. We have a certified copy.

COURT: From Mr. and Mrs. Herrmann to Hall?

Mr. UPTON: Yes.

COURT: Very well.

Marked "Plaintiff's Exhibit 24."

(Note: Plaintiff's Exhibit 24 is the same as Exhibit "A" attached to and made a part of complainant's Bill of Complaint.)

Mr. UPTON: Also a partial release of the \$2200 mortgage, executed by Mr. John F. Hall, as attorney in fact for Christian Herrmann.

Marked "Plaintiff's Exhibit 25."

Mr. UPTON: If the Court please, we desire to offer in evidence also, the answer filed by John F. Hall and the Title Guaranty & Abstract Company and others, in the case of Christian Herrmann, complainant, against John F. Hall, and others, in a proceeding that was brought prior to this, which was afterwards dismissed, and this suit substituted in its place. We haven't the answer here but we can send down to the Clerk's office and get it.

COURT: Very well. You can put it in later.

Mr. UPTON: We can put it in at the time we call attention to the matters.

COURT: Very well.

Mr. ST. RAYNOR: Will counsel stipulate that Mr. Henry Sengstacken, L. D. Smith and Z. T. Siglin were the incorporators of the East Side Land Company?

Mr. PECK: I think we allege that in our answer.

Mr. ST. RAYNOR: And its Articles of Incorporation?

Mr. PECK: We admit that.

Mr. ST. RAYNOR: Dated April 10, 1911.

Mr. PECK: Certainly.

Mr. ST. RAYNOR: And that Mr. Henry Sengstacken was the first president, elected immediately after the articles of incorporation were made, and the corporation organized?

Mr. PECK: Yes.

Mr. ST. RAYNOR: And also that Mr. Henry Sengstacken the defendant, was at that time and August 30, 1905, president of the Title Guaranty & Abstract Company?

Mr. PECK: Yes.

Mr. ST. RAYNOR: And has been ever since?

Mr. PECK: Yes.

(Testimony of Charles Julius Bruschke for Complainant.)

Whereupon the complainant to further support the issues in his behalf, called as a witness, Charles Julius Bruschke, who being first duly sworn, testified in substance as follows:

Direct Examination.

That he resides in Marshfield, Oregon; has resided there since the 20th day of April, 1902; that he has since that time been engaged in the real estate, timber cruising and general land business; has had wide experience in the real estate business in platting land, timber cruising and selling timber lands around Coos Bay and through the surrounding country; that he has sold a great amount of land in said district; that he has been engaged in buying and selling land since 1902 in Coos County and vicinity and in Curry

and Douglas counties, Oregon.

Said witness further testified that he has been over the Norman and Holcomb tracts several times; went over it first time in 1898 before he located in Marshfield; that he investigated it with a view to purchasing it in 1905; that at that time he was looking for a location for a manufacturing town-site with deep water frontage; that this property appealed to him most because of its having a deep water frontage; that when he was examining the property and investigating it, he learned that defendant, John F. Hall, was representing the property and that he called upon him and asked defendant, John F. Hall, if the property was for sale and Hall replied that it was, this was early in 1905 about the month of March; that Hall told him the property was for sale but the owners did not live in this country and that he would have to write to them; that it would take some time to get a reply, it might be three weeks or perhaps longer, but that as soon as he received a reply he would let him know; that he informed Hall at that time that he was desirous of negotiating the purchase of said property; that he told Hall he had a party who was looking to invest with him, that they intended to locate somewhere around there and they wanted to get prices on any land that they could get for their purposes; that Hall thoroughly understood that he wanted to purchase it and that Hall told him he would write and ascertain what it could be sold for; that about a month later he again called on Hall

who informed him that he had not received an answer to his letter; that he told Hall he was anxious to get an answer because he had to secure some land for the purposes for which they desired this property and that this property appealed most to him; that he did not tell Hall for what purpose he wanted this land; that Hall's only reply was that he had not heard from the parties.

Whereupon said witness further testified as follows:

“Q. Did he tell you who the parties were?

A. He said they were German people, and they were corresponding; it was difficult to get any reply; that one of the gentlemen was 69 years old, and that in all probability he wouldn't come here, but they had written him he might come, and perhaps would not answer until he would arrive here.

Q. Now, what time was it that you had that conversation with him, Mr. Bruschke?

A. That was about April, 1905.

Q. Did you see him after that in reference to it?

A. No, I then—I looked around for other property around the bay, and in 1905, in June, the 27th of June, I came to Portland here and remained here for—until the 11th—until the 9th day of October, 1905.

Q. Did you see him at any time during the month of June of that year,—well, I will ask you this; did you leave that country at any time during the summer of 1905?

A. I left there the 27th of June.”

Whereupon said witness further testified in substance as follows:

That the last conversation he had with Hall about this property was about a month before he (Bruschke) left for Portland, which was on the 27th day of June, 1905; that he never had any talk with Hall about the value of the land, he simply wanted to get the price; that Hall did not put any value on it to him.

And said witness further testified that he had been acquainted with L. D. Smith, a defendant in this case, since 1903; that Smith came to him early in 1905 and asked him his opinion as to the value of this property; that he told Smith he thought it was the best property on the Bay because it had deep water frontage, and, as they all knew, it was underlaid with coal, and it would make a town-site; that Smith did not make any reply except that he thought it was a good piece of property, that he told Smith he thought it was the best piece of the property on the Bay; that he is not positive whether he told Smith what his judgment was as to the value of this land; that Smith just wanted to know what he thought of the property, the location; that he told him it was on the peninsula, and the Catching Slough being on the southeast of it, and there being deep water on both sides, the day would come when it would be the best piece of property on Coos Bay; that he did not talk with Smith after Smith bought an interest in the property until two years ago when he offered Smith \$250,000 for it, and that Smith told him that he could not accept this

offer without consulting other parties; that at that time he did not know who the other parties were. That he has sold more large tracts of land for platting purposes and also timber lands around Coos Bay, than any other real estate man there; that he sold large tracts on the East Side and about 10,000 acres along Coos River, also about 3500 acres in the peninsula including Empire, and various other large tracts of land in that vicinity; that he had a contract for handling Bay Park, a tract of 180 acres near the Norman tract; that he had been over the Norman (Holcomb) tract many times, went over it first in '98 before he located in Marshfield, and in 1905 he investigated it with a view to purchasing it for manufacturing townsites with deep water frontage.

That the Norman tract was, in his opinion, worth \$100 per acre during the month of August, 1905; that at that time said land was available for manufacturing, steamship wharves, shipping and townsite purposes; that during the years of 1904 and 1905, and as late as 1906, the Southern Pacific Company had been surveying what is known as the "Drain Line," and that during that time the survey ran over the Norman (Holcomb) tract; that the announcement of the construction of the Drain Line and the commencement of construction work on the same in the early spring, about May or June, 1905, gave an impetus to real estate values; that the main impetus in real estate values around Marshfield came from the announcement of the Lewis & Clark Fair at Portland in 1905.

Whereupon said witness on cross-examination by solicitors for defendants, testified in substance as follows:

Cross-examination.

That when he talked with Hall about purchasing this land, Hall did not tell him that Deane & Company had the boom right on this land; Hall told him this land was for sale but that he (Hall) couldn't get any satisfaction from the owners, they weren't living here, as soon as he heard from them he would let him know; that L. D. Smith came into his office a few weeks before this hearing, when the depositions were being taken in Marshfield in this suit, and said to witness: "Bruschke, I understand you are going to testify against me. If you do, I will impeach your testimony." To which witness replied, "Mr. Smith if you will bring one man that will impeach my testimony, or that I owe a dollar to, I will give you one thousand dollars for every man you bring," that inside of half an hour thereafter Smith came back and apologized; that witness has no personal interest in this suit whatever.

Whereupon said witness further testified as follows:

Q. Isn't it a fact, Mr. Bruschke, that in Coos County, in the Circuit Court, in the case of Bruschke vs. O'Connell, several witnesses testified impeaching your testimony in that case?

Mr. ST. RAYNOR: I object to that. I submit

that this is completely out of range and incompetent.

COURT: I don't think that is proper cross-examination.

Mr. PECK: If we can impeach the witness by himself?

COURT: You are asking what some other witness testified in some other case.

Mr. PECK: I am getting at his reputation in that community.

COURT: You can ask him whether his reputation is good or bad if you want to.

Mr. ST. RAYNOR: You can't impeach—you know that, Mr. Peck, you can't impeach a witness by specific matters. You have to impeach him by his general reputation. That is the statute.

COURT: You can cross examine him.

Question read as follows: "Isn't it a fact Mr. Bruschke, that in Coos County, in the Circuit Court, in the case of Bruschke vs. O'Connell, several witnesses testified impeaching your testimony in that case?"

A. No, sir, it is not.

Q. Isn't it a fact, Mr. Bruschke, that in the case of the Circuit Court of the State of Oregon, in Coos County, of Gettings vs. Hennessey, several witnesses testified impeaching your testimony?

Mr. ST. RAYNOR: I submit that is not proper cross-examination.

COURT: I think he may answer the question.

A. From the record of the stenographer which

was read to me, they had tried to impeach me during my absence, and one of them was Judge Hall that volunteered to go on the stand to impeach my testimony, but I wasn't there. And when I returned to Marshfield, everybody surrounded me and said "Bruschke, you are all right, you are all right." Well, I didn't know what it was about until they told me Judge Hall had tried to impeach my testimony, and said there was out of 10,000 people on the bay there—there would be 7500 at least, that would not trust me under oath.

Q. That is the real trouble between you and Judge Hall, isn't it, Mr. Bruschke?

A. And then he was asked to name one. He said he couldn't name one, and when he was asked if he had anything against me he said he hadn't; and that is the record in the County Court in Coos County.

Q. And that is the real trouble between you and Mr. Hall?

A. We never had any trouble. I am just as friendly to Judge Hall today as anyone. I have no enemies. I love mankind, but I tell the truth that I know it before God.

Q. You have no ill feeling towards Judge Hall?

A. No, sir.

Q. And when your face reddened up a moment ago, that didn't indicate any hard feeling?

A. I presume my face is red all the time.

Q. In the case of Bruschke vs. Hagland, in the Circuit Court of Coos County, did not the witnesses

impeach your testimony, or go on the stand to testify impeaching your testimony in that case?

A. No, sir, I repeat the same thing, that no one has ever succeeded in impeaching any of my testimony, nor is there anybody in the world that can do so, although I have been in different countries. That is one thing I am proud of, that I have told the truth all my life, everywhere.

(Testimony of W. W. Graves, for Complainant.)

Whereupon the complainant to further support the issues in his behalf, called as a witness, W. W. Graves, who being first duly sworn, testified in substance as follows:

Direct Examination.

That he resides in Portland, Oregon; that from August, 1904, until July, 1905, he resided at Marshfield, Oregon; that he is an attorney and had experience in real estate values in and about Marshfield about that time; that he had some property at Marshfield and was more or less interested in values, having speculated some in real estate there; that in 1906 he bought 40 acres northwest of Marshfield, about the middle of the peninsula, and sold it five months after he purchased it; that he bought two forty-acre tracts in the center of the East Side peninsula between Catching and Isthmus Sloughs in 1906 or 1907; that he had been conversant with real estate values there to the extent of trying to get prices on land on the East and West side; that he knew the tract of land involved in this suit known as the Norman tract; that

he taught school there in the winter of 1904 and 1905; that he had been over the Norman tract during the winter of 1904-05 but that he couldn't say that he tried to purchase it; that he enquired about it and understood that it wasn't for sale; that he tried to find out about it from different real estate men—various real estate men in Marshfield; that he didn't know the tract was for sale; that it wasn't for sale as he could find out; that he knows defendant Henry Sengstacken; that Henry Sengstacken approached him in the winter of 1904-05 for the purpose of getting him to purchase an interest in this proposed tract; that Sengstacken told him that he could get him an interest in this tract; that he doesn't know exactly what the amount was but that it was in the neighborhood of \$100 per acre or somewhere about it, but it might have been \$70 or \$65 and it might have been \$125; that he did not know of any information current in the community during the winter of 1904 and summer of 1905 that this property was for sale; that his understanding was, as he was led to believe, not only by Henry Sengstacken but by others that it belonged to—that Spreckles had some kind of a hold on this ground.

And said witness further testified as follows:

“Q. What did you consider in the spring of 1905, and the month of August, 1905, this Norman tract of land to be worth? * * *

A. Oh, there wasn't any land in there that wasn't worth, and wouldn't bring \$100 an acre. I would have

paid \$100 an acre for all I could have managed of it. I would have bought 40 acres at \$100 an acre in the fall of 1904 and '05, if it had been offered me or if I could have gotten it.

Q. How would it be in the spring of 1905 and August, 1905?

A. I don't know as any difference in prices, about the same. Real estate was moving about the same all of 1905."

Whereupon said witness on cross-examination by solicitors for defendants, testified in substance as follows:

That he did not buy any land in 1904 or 1905.

Whereupon the following proceedings were had and stipulations entered into in open Court between plaintiff and defendants.

Mr. ST. RAYNOR: I will ask counsel for the certificates that are set forth in your answer of these different undivided shares that James T. Hall, John F. Hall, L. D. Smith, D. L. Rood, S. C. Rogers, Henry Sengstacken and J. J. Clinkinbeard obtained in this property on the 30th of August, 1905, as requested of you by the notice served upon you by the complainant in this case on the 13th of December, 1912.

Mr. PECK: I hand you the following certificates dated October 2, 1905. "This is to certify that D. L. Rood is the undivided one-twelfth owner of land conveyed by Dora Herrmann and her husband, dated September 1, 1905, and recorded in Book 41, of Records, Page 336, Coos County, Oregon, containing 280

acres of land more or less, and being deeded to the Title Guarantee and Abstract Company, Trustee, by Henry Sengstacken, Manager." And would say that we have in Court all of these that we have been able to find, but will further say that this is a duplicate of the several certificates that were issued at that time, except that the owner's names are different, and that the interests as purchased were different.

Mr. ST. RAYNOR: Well, have you the certificates that were issued to John F. Hall and James T. Hall (Mr. Peck hands paper). Have you the one to James T. Hall?

Mr. PECK: No. That is the one issued to John F. Hall, with John F. Hall's endorsement on it.

Mr. ST. RAYNOR: Have you the certificates to the other persons named?

Mr. PECK: We think Mr. Smith has one to himself, or I think it was issued in the name of his wife actually, and I think he has Clinkinbeard's.

Mr. ST. RAYNOR: I wish you would produce them, please.

Mr. PECK: Mr. Smith isn't here.

COURT: They are just the same as that. What is the use of taking up time? Counsel says they are just the same.

Mr. ST. RAYNOR: That will be all right. Will counsel stipulate that these respective interests set forth in these different certificates to John F. Hall, James T. Hall, Henry Sengstacken, L. D. Smith, D. L. Rood, S. C. Rogers and J. J. Clinkinbeard were in-

terests that were obtained by them in the land in question in this case, known as the Norman tract, on the 30th day of August, 1905, at and previous to the time on that day, that the deed which was executed by Mr. John F. Hall, as attorney in fact for the complainant and Dora Herrmann to the Title Guarantee and Abstract Company?

Mr. PECK: We will stipulate exactly what we have plead in our answer. I don't exactly catch the form of your question. We have set up in our answer exactly the manner in which we did obtain this title.

Mr. ST. RAYNOR: It would expedite matters considerably. What I want you to do is to stipulate that all of these interests were obtained by all of these parties, these undivided interests, on the 30th of August, 1905, at the time and previous to the delivery of that deed. That don't cut you off—

COURT: Your proposition is an admission that these certificates represent interests that these people had in the property or claim in the property?

Mr. ST. RAYNOR: Claim in the property they procured the 30th day of August, 1905.

COURT: They won't admit that, because they allege they procured it long before that.

Mr. ST. RAYNOR: What I mean is this, your Honor. That they obtained their interest on that date, the 30th of August, 1905, under these certificates that were issued later.

Mr. PECK: We will admit that the legal title vested in the Title Guarantee and Abstract Company on

August 30th—I think August 31st.

COURT: And that these certificates were issued by the Abstract Company to the individual owners, showing the interest they each had.

Mr. PECK: Showing the equitable interest of each party at the time they were issued.

Mr. ST. RAYNOR: And that John F. Hall and James T. Hall procured their undivided interest on the 30th of August, 1905.

Mr. PECK: Yes, certainly we admit that, though we don't admit they obtained it under this deed; admit they obtained it from Sengstacken and Smith.

Mr. ST. RAYNOR: What I want you to do—I don't think it prejudices your contention, and it will expedite matters if you will admit that Mr. John F. Hall and James T. Hall procured their undivided interest in this property the 30th of August, 1905, previous to the delivery of this deed.

Mr. PECK: No, we couldn't admit that. The legal title was always in the Title Guarantee and Abstract Company, but the equitable title we maintain they secured before that time.

Mr. ST. RAYNOR: Then will you admit that the Title Guarantee and Abstract Company took it in trust as trustee for John F. Hall and James T. Hall—their undivided shares as represented in the certificates of the 30th of August, 1905.

Mr. PECK: We will admit that they took the legal title, but the equitable title, we claim, had already been conveyed to Sengstacken and Smith.

COURT: I don't see any contention between you gentlemen about the matter. It is shown in the record that it was conveyed by Hall to this Company on the 30th of August, and that the Company subsequently issued to the several owners certificates showing interest they had, or claimed to have in the property.

Whereupon complainant to further support the issues in his behalf, called as a witness Henry Sengstacken, who being first duly sworn, testified in substance as follows:

Direct Examination.

That he is one of the defendants in this case; that he is conversant with the land involved in this suit known as the Norman tract; that he brought about or caused the platting of a portion of this land into town-site plats; that he caused to be platted the additions named East Side and Home Addition to East Side, out of the Norman tract; that it was platted in the name of the Title Guaranty & Abstract Company, Trustee, and that he was at that time President of said Company; that the Title Guaranty & Abstract Company sold lots from the East Side plat.

Whereupon said witness further testified as follows

Q. Will you kindly tell me how many lots were sold? Have you a list of them, Mr. Sengstacken so as to expedite it?

A. I have not, but I think you have it in your hand

—a statement that I rendered in connection with the property in which the entire transaction was stated.

Q. In this exhibit?

Mr. PECK: May it please the Court, we attached to our answer a complete account of receipts and disbursements, of every dollar received and every dollar paid out in connection with this tract. I think that is sufficient.

Mr. ST. RAYNOR: Will you admit that, Mr. Peck, so as to expedite matters, that all of these lots that are referred to in this—

COURT: Is that contained in his answer?

Mr. PECK: Yes.

COURT: Then of course he has admitted it.

Mr. ST. RAYNOR: I just wished to introduce the part in reference to lots and prices. There is a lot of other matter in there.

Mr. PECK: It is all in anyway.

Mr. ST. RAYNOR: I know, but what I want you to do is to admit that all these lots were sold by the Title Guaranty & Abstract Company at the prices specified.

Mr. PECK: Some were sold by the East Side Land Company.

A. Might have been some sold through other agents, handling through the Title Guarantee and Abstract Company as general agents.

Q. Now, can you give us the dates that these lots were sold, or between what dates?

A. The statement that I have rendered shows

when the first payments were made, and when subsequent payments were made, I think; perhaps not in detail.

Q. No, there are no dates shown here, Mr. Sengstacken.

A. I have the old books of the Title Guarantee within this—the commencement of this transaction which will show from the first date.

Q. Can you procure that so we may get it into the record, the dates you commenced the sale and when you terminated them?

A. Well, we haven't terminated, but I can show you the beginning of the sales.

Mr. ST. RAYNOR: Will you bring that, please?

Mr. PECK: May it please the Court, here we have set out every lot that has been sold in this manner.

COURT: With the date?

Mr. PECK: The date isn't there, but we will say we sold subsequent to the plat, and we don't care how soon afterwards. They were sold subsequent to the plat which was in 1907, and they can have them all sold in 1908, as far as we are concerned. They were sold subsequent to the date of the plat in the ordinary course of business.

Mr. ST. RAYNOR: That is what I wanted to find out.

A. If you desire the date of the home addition, when it was filed, I have it.

Q. Yes, I would like that, Mr. Sengstacken.

A. September 8, 1910.

Mr. ST. RAYNOR: That is all.

Mr. PECK: Were any of those lots sold out of the plat before the filing of the plat?

A. No.

(Testimony of Emma F. Stuttsman, witness for complainant.)

Whereupon, complainant to further support the issues on his behalf, called as a witness, Emma F. Stuttsman, who being first duly sworn, testified in substance as follows

Direct Examination.

That she is a resident of Marshfield, having lived there the past fourteen years, and for the past eight years she has been engaged in the real estate business exclusively; that during that time she has been acquainted with the tract of land known as the Norman tract, involved in this suit; that she first began buying real estate on Coos Bay in 1904; that she opened a real estate office in 1906; that she has bought and sold a great deal of business property and ranches; that she thinks she had more dealings in business property than anyone around there; that she has bought and sold real estate of all descriptions, acreage, lots and farms.

That she knows defendant, John F. Hall; that she did not know anything about different ones handling the Norman property in the spring or August, 1905, or previous to that; that she did not know of him (Hall) putting it on the market for sale anywhere at

that time or previous to that time; that she has been looking for real estate purchases and transactions for the last nine or ten years; that if this tract had been on the market she would have been apt to know it.

Whereupon said witness further testified as follows:

“Q. Were you acquainted with the Norman tract in 1905, in the spring?

A. Yes, I was acquainted with it.

Q. And in the summer of 1905?

A. Yes.

Q. You know its location well, do you?

A. Yes, sir, I know its location, joining on the South of East Marshfield—joins.

Q. Were you acquainted with the values of that kind of property in 1905 in the spring and summer, and particularly in the latter part of August, 1905?

A. Yes, I was acquainted with the real estate values of that and all land. I should judge the value of that land * * *

Q. In your judgment, Mrs. Stuttsman, during the spring of 1905 and August, 1905, what was this Norman tract worth?

A. Well, at a low, reasonable estimate from \$75 to \$150 an acre; water front would be \$150 and the back land would be, a low, reasonable estimate, \$75 an acre. * * *

Q. Do you know anything about any railroad construction of the Southern Pacific from Drain in the

direction of Marshfield during any time in the years 1904, '05 or '06—what time was it?

A. 1905 in the spring, it was announced that the Southern Pacific would build into Marshfield.

Q. What effect did that have upon the value of this particular property, and other property in the vicinity there?

A. Well, on all property; people of course got excited like they always do when a railroad—when talk of railroad construction, and they were all anxious to buy—to buy property.

Q. What effect did it have on values?

A. Well, it didn't—certainly didn't go down; they certainly didn't go down, everyone wanted the raise.

Q. What effect did it have, Mrs. Stuttsman?

A. It raised the values of land.

Q. Had the effect to raise the value?

A. Certainly it did; town values and acreage and all.

Q. When was the construction work commenced on that railroad?

A. The actual construction was announced, I am most positive in August, 1905—first of August.

Q. Well was there any excitement prior to the first of August, 1905?

A. Yes, considerable, considerable.

Q. For how long?

A. Well, they began the survey I think—the talk began in 1904 some, but when they began their survey in the spring of 1905, why the excitement oc-

curred to the full extent.

Q. To a considerable extent?

A. Yes, considerable extent.

Whereupon said witness on cross-examination by solicitor for defendants, testified in substance as follows:

Cross-examination.

That she opened a real estate office in 1906; that she sold real estate in 1904 and that she was hunting for acreage in 1902 and in 1904-5 she was looking for coal propositions for Mr. Stuttsman; that she began active operations in the real estate business in buying and selling for people in 1906; that she had heard about an option which complainant, Christian Herrmann, had given A. H. Stuttsman & Company on this land but that she hadn't seen it.

Whereupon said witness further testified on re-direct examination as follows:

Q. Do you know what the purpose of that option was, Mrs. Stuttsman?

A. That was to keep from any more being sold until this thing was settled; that was all—we were to release it at any time; we weren't to get the benefit of that option at all; it was to be withdrawn at any time; we was getting no benefit of it whatever.

Whereupon complainant offered and it was received in evidence and marked "Plaintiff's Exhibit 27" a certified copy of a petition made and verified by John F. Hall and filed in the County Court of the

State of Oregon for Coos County, in the matter of the Estate of Dora Herrmann, deceased, and the material part of said petition was read in evidence as follows:

“That the only heir at law of the said deceased is Rentier Christian Herrmann, her husband, a resident of Hildesheim, Germany, aged 68 years.”

Whereupon complainant offered and it was received in evidence and marked “Plaintiff’s Exhibit 28” a certified copy of an order of the County Court of the State of Oregon for Coos County, dated the 27th of November, 1905, in the matter of the Estate of Dora Herrmann, deceased, on said petition of John F. Hall, (Plaintiff’s Exhibit 27), the material portion of which said Order was read in evidence as follows:

“The petitioner was, at the time of the death of said deceased, and had been for many years prior thereto, the agent and attorney of said deceased and that he is now a creditor of said deceased; that the deceased left no heirs at law within the United States of America, and no creditors, except petitioner, to the knowledge of petitioner; that the only heir at law of said deceased is Rentier Christian Herrmann, her husband, a resident of Hildesheim, Germany, aged about 68 years.”

(Testimony of James Watson for defendants.)

Whereupon, the defendants to support the issues in their behalf, called James Watson, who being first duly sworn, testified as follows:

Direct Examination.

That he resides in Coquille, Coos County, Oregon:

that he has lived there a little over 41 years and before that time he resided in Coos Bay and Marshfield; that he is pretty well acquainted throughout that district; that he is County Clerk of Coos County and has held that position for eight and a half years; that during that time he has resided at Coquille; that he knows C. J. Bruschke; that the reputation of C. J. Bruschke for truth and veracity in the community in which he lives is bad.

Whereupon said witness on cross-examination by solicitors for complainant, testified in substance as follows:

That he first heard that Bruschke's reputation was bad about three or four years ago or maybe longer; that Bruschke had some cases around there in Court and he remembered that Bruschke was discussed at that time; that he had a conversation with John F. Hall about this matter; that John F. Hall told him this; that he discussed the matter in regard to these cases with John F. Hall; that he remembers one case in which Bruschke had sued for commission on some land and he thinks it was Hogland or Hagland or some such a name; that he drew his conclusion from what Hall told him in regard to that case and other things; that he did not know anything particularly about the facts in the case but that he heard part of the testimony; that he does not know anything about the merits of the case; that he didn't know whether there was a great amount of antagonism against Bruschke by some of the witnesses or not, but there

might be, there was probably some feeling about it; that he had heard other people say that Bruschke's reputation for truth and veracity was bad; that he heard Judge Coke say this before he went on the bench, and also C. F. McKnight and a number of others; that this was along about the time of the trial of the cases he referred to; that he does not know of his own knowledge anything against the integrity of Bruschke; that he never had any dealings with Bruschke that indicated to him that he was other than an honest, upright man; that he has never had any cause to question Bruschke's integrity; that he doesn't remember whether Judge Coke was on one side of the cases referred to or not, but Judge Hall was; that he doesn't remember whether C. F. McKnight was an attorney in any of the cases referred to; that he drew his conclusion as to the reputation of C. J. Bruschke from what the gentlemen he had referred to told him.

(Testimony of B. C. Bradbury, for defendants.)

Whereupon the defendants to further support the issues in their behalf, called as a witness, B. C. Bradbury, who being first duly sworn, testified in substance as follows:

Direct Examination.

That he has lived in Coos County for about 21 years; that he left there two years ago in June; that he was not personally acquainted with C. J. Bruschke but knew him by sight; that his reputation for truth

and veracity in the community in which he lived was not considered good; that he was considered a joke by nearly everybody.

Whereupon said witness on cross-examination by solicitors for complainant, testified in substance as follows:

Cross-examination.

That he (Bradbury) was sued by complainant Herrmann in another case which was tried in this Court recently; that John F. Hall did not tell him that Bruschke's reputation for truth and veracity was not good, that he heard it as common talk ever since Bruschke was there; that it was just a hearsay proposition; that he never heard anyone particularly mention it except one party, he thinks this party's name was Mr. Hutchinson, he never heard anyone else mention it.

(Testimony of W. W. Doyle for defendants.)

Whereupon the defendants to support their issues in their behalf, called as a witness W. W. Doyle, who being first duly sworn testified in substance as follows:

Direct Examination.

That he has resided in Bay Center, Washington, for the last eight months, prior to that time in Marshfield, Oregon, and while in Marshfield he knew C. J. Bruschke; that the reputation of Bruschke in the community, with regard to truth and veracity, was bad.

Whereupon said witness on cross-examination by solicitor for complainant, testified in substance as follows:

Cross-examination.

That he had heard an attorney, E. A. Seaman, and George Beale, a real estate man, say that Bruschke's reputation for truth and veracity was bad; that John F. Hall never has represented witness as his attorney; that witness is a common laborer and what is termed a lumber-jack; that he has known Bruschke ever since he has been in Coos County; that he has been personally acquainted with him since about 1906; that he has never had any differences with Bruschke; that he has been in the timber with Bruschke for several days at a time, got pretty well acquainted with him; that he never knew of him making any real estate transactions; that there is nothing between witness and Bruschke of a personal nature that would convince him that Bruschke's reputation for truth and veracity is not good, except that Bruschke wanted him to report favorably on some timber he was cruising; that he knows nothing else except what he has heard others say.

(Testimony of John F. Hall, for defendants.)

Whereupon the defendants to support the issues in their behalf called John F. Hall, one of the defendants herein, who being first duly sworn testified in substance as follows:

Direct Examination.

That he is 56 years old, resides in Marshfield, Ore-

gon and is an attorney at law, at the present time is the County Judge of Coos County and has held that position for six and one-half years and previous to that time was County Surveyor for four years; that he first became acquainted with Dora Norman about 1878 or 1879 when she first came to Coos Bay and knew her from that time until she left the Coos Bay country; that he thinks she left the Coos Bay country the last time about 1901 or 1902; that he never acted as attorney for her husband, John Norman, but acted as her attorney from 1898; that from his observation Dora Norman was a pretty shrewd business woman, didn't have much education but always kept tab on everything that was going on; that she looked after the details of her property pretty carefully and knew the details particularly; that he had correspondence with her after she went to Germany.

Whereupon said witness further testified that he received a letter from Dora (Norman) Herrmann, of date June 9, 1902, which letter was offered and admitted in evidence, marked "Defendant's Exhibit A" and read as follows:

"Hildersheim, June 9, 1902.

Dear Mr. Hall: Many thanks for the reception of your letter with money for which I return my thanks. I am very glad you sold the house but I hope you will send me the money as soon as possible for I am in need of it; and also to collect the rents a little stricter and send it to me. Is there no chance of selling the timber land or any of the others. Please inform me

as soon as possible. Have you no chance yet of selling the big house? Dear Mr. Hall please do me the favor and tell me as soon as you can when and what date you received my letter. I wish for the certificate of Norman's death; I wish very much to know. I informed of my engagement and of course we are now married and very happy together. I hope this letter will find you and all your family in good health. Hoping this will find you well, I close with best wishes and remain,

Yours very truly,

Dora Herrmann.

Mrs. Dora Herrmann, Gartenstrasse 15, Hildersheim, Hanover."

Whereupon said witness further testified that he answered the above letter under date of July 2, 1902, which answer was offered and admitted in evidence, marked "Defendant's Exhibit B" and read as follows:

"July 2, 1902.

Mrs. Dora Herrmann,

Garten Street No. 15,

Hildersheim, Hanover, Germany.

Dear Madam:

Yours of the 9th of June received here by us on the 1st of this month, yesterday.

I received the letter asking for the certificate of Mr. Norman's death on or about the 26th of March, the second request by wire was received about April 1st.

I hope that you and your husband will live long and happy. We send you our congratulations.

Below is a copy of our receipts and disbursements since April.

CASH RECEIVED.

April 5th	J. W. Bennett (for Maginnis)	
	House on Pine Street.....	\$1200.00
April 30th	C. A. Moore, rent.....	40.00
May 1st	Peter Clausen rent.....	15.00
May 6th	R. C. Cordes rent	15.00
May 14th	J. L. Ferrey rent	30.00
May 31st	C. A. Moore rent	40.00
June 1st	Peter Clausen rent.....	15.00
June 5th	J. L. Ferrey rent	30.00
June 6th	R. C. Cordes rent	15.00
June 7th	R. A. Easton, taxes on Moody land (Griffin)	13.24
July 1st	C. A. Moore rent	40.00
Total receipts.....		\$1453.24

DISBURSEMENTS

April 5th	German Consulate Portland.....	2.55
April 7th	County Clerk Certificate.....	.50
April 10th	German Consulate Portland.....	1.35
April 11th	Road tax district	6.05
June 23rd	Road Tax on Lewis Land.....	.48
July 2nd	Hall & Hall, fee collecting rent....	12.68
July 2nd	Hall & Hall, deeds and services to house on Pine St. to Maginnis	10.00

July 2nd Check to Dora Herrmann en-
closed herewith 1419.65

Total paid out including check....\$1453.24

We have not had to make any improvements this term but will have to make some before winter; the foundation to the big house (Blanco) will have to be repaired; Mr. Sengstacken wants to buy the 80 acres next to Timmerman, he would like to get the land with all mineral rights, or he will take the land you and reserve the mineral rights; write me what you will do in the premises.

When you write tell me what month C. A. Moore paid you the rent; he and I cannot agree as to what; I have been claiming one month more and he says that he paid it to you.

We enclose you herewith a deed from you and your husband to John Gammill and Thomas Spencer, consideration five thousand dollars. Mr. Gammill says that he will pay us the money as soon as the deed is returned properly signed; their bond expired on the 25th of last month but Mr. Gammill thinks it will be all right with you; I hope it will. There is considerable demand for timberland and we think that we will be able to dispose of yours this summer; write us you lowest price, in case you have changed it since you left. Let us hear from you as early as possible.

With kind regards to yourself and husband, we are,

Very truly yours,

Hall & Hall by John F. Hall."

In case you sign the Gammill deed that takes the land that Sengstacken wants.

John F. Hall."

Whereupon witness further testified that he received another letter from Dora Herrmann, dated June 22, 1902, which was offered and admitted in evidence, marked "Defendant's Exhibit C" and read as follows:

"Hildersheim, June 22nd.

Mr. Hall, Marshfield:

You I received the letter with the money and you promised to send me the money for the house you sold. Now, I wish you would send it as quick as possible for I need the money. I wish you would see for the knobs (?) with the plate glass for the big windows, and I wish you would put it away in assemble room in the Blanco. Can you sell any land for me? Please try what you can do. I like to sell everything out. In your last letter you asked me if I get married. I am married and live very happy. Please give Mrs. Terry my regards and please to tell her that I am married. I hope you will try the best you can and send me the money as quick as possible. I am,

Yours truly,

Dora Herrmann.

Mr. Herrmann sends you his best regards. Address: Mrs. Herrmann, Hildersheim, Gartentrasse

15, Germany.”

Whereupon said witness further testified that he replied to said letter on July 22, 1902, which reply was offered and admitted in evidence, marked “Defendant’s Exhibit D” and read as follows:

“July 22nd, 1902.

Mrs. Dora Herrmann,
Hildershein, 15 Garten St.,
Hanover, Germany.

Dear Madam:

Yours of June 22nd received. Will say that on 2nd of this month we forwarded money for house on Pine St. also all money we had collected for three months prior to that date. We also asked you to set a price on all the property you wished to dispose of. We are having a little boom in real estate and it looks as though we would be able to sell the Woodward claim and the Lewis land and possibly the Blanco though most people think your figure is too high for that. There is lots of talk about another railroad. We hope it will be built though I don’t think it will.

Very truly yours,

Hall & Hall.”

Whereupon said witness further testified that he received a letter dated January 1st, 1902, from Dora Herrmann, which was offered and admitted in evidence, marked “Defendant’s Exhibit E” and read as follows:

"Hildershein 1 - 1 1902

Dear Mr. Hall:

I send you the lease for Mr. Moore and the deed for Mr. O. E. Smith; I have assigned the deed and the same time I was by the Counsel. Don't sell it cheaper than \$1200. Send, please, me the rest of the account of last year; you can collect it every month and be a little stricter that you can send it to me at least all three months. Please Mr. Hall, send me the certificate by which it is proved that Mr. Norman drowned on the 20th October, 1896, and let it stamped by a notary and proved by witnesses. Please send it very soon as I need it in account of some business. Can't you to sell some property of mine. I read in the paper that it is such a good time for selling land. Please try your best. I like to get ready of it; let me know if John Gammill if he yet prospect to that land for coal, if it is a chance there to sell it. I beg you for another time; do not forget to send me the certificate because I need it very particular. I hope you and your family being well, I remain,

Yours truly,

Dora Norman."

Whereupon counsel for defendant stated that the above letter should have been marked Exhibit A as it was first in point of time. Whereupon said witness further testified:

That he wrote Dora Herrmann on January 7, 1903, and a copy of said letter was thereupon offered in evidence, admitted and marked "Defendant's Ex-

hibit F" and was read into the record as follows:

"January 7, 1903.

Dora Herrmann,

15 Garten Street,

Hildershein, Hanover, Germany.

Dear Madam:

Enclosed herewith find check for three hundred and thirteen dollars and fifty cents (\$313.50); our account for the last three months will be as follows:

RECEIPTS

Oct. 4	1902	R. C. Cordes	\$ 15.00
Oct. 7		Peter Clausen	30.00
Oct. 27		C. A. Moore	40.00
Nov. 4		J. L. Ferrey	30.00
Nov. 8		R. C. Cordes	15.00
Nov. 6		Peter Clausen	15.00
Dec. 6		R. C. Cordes	15.00
Dec. 12		C. A. Moore	40.00
Dec. 22		J. L. Ferrey	60.00
Jan. 3	1903	C. A. Moore	40.00
Jan. 3		J. L. Ferrey	30.00
			<hr/>
			\$330.00

DISBURSEMENTS

Jan. 5, 1903	Hall & Hall	\$ 16.50
7	Check Mrs. Herrmann.....	313.50
		<hr/>
		\$330.00

Times are a little better just now. But at the time

we should have made the improvements we could not get any one. But it may be necessary to make some in the early spring. Sengstacken and myself have both been trying to locate Holcomb but have been unable to do so. It may be necessary to commence a suit to perfect your title to the Holcomb land. We wrote Walters the other day and no doubt he will write you particulars. Wishing you a Happy New Year.

Hall & Hall."

Whereupon said witness further testified that he received a letter from Dora Herrmann dated February 8, 1903, which was offered and admitted in evidence, marked "Defendant's Exhibit C" and read as follows:

"Hildershein, February 8, 1902.

Mr. Hall:

In answer to your respected letter of the 7th of January, there will probably be no other help for us but to commence a lawsuit against Holcomb. I therefore ask you to do all that is required for it. Before doing that, however, I beg you to ask Douglas if he perhaps knows the address of Holcomb since they have up to the last time been in connection. Have you not got any more the deed of the sheriff's sale? By a close examination of it the affair might perhaps be arranged by it. Has Tery taken my hotel again now? I would be much pleased if I could sell the hotel; I should give it away for about \$10,000. I should be satisfied with a small pay on account, perhaps 3-5000 dollars, even still less. Your letter and the

money I have got. With kind regards from me and my husband, Dora Herrmann."

Whereupon said witness further testified that he wrote Dora Herrmann a letter on the 24th of March, 1903, a copy of which letter was offered and admitted in evidence, marked "Defendant's Exhibit H" and read as follows:

Dora Herrmann,

15 Garten Street,

Hildershein, Hanover, Germany.

Dear Madam:

Enclosed herewith we mail deed for the Woodward tract of land. You will note that the consideration is nine hundred dollars; the last figure you gave us eight hundred; we think that this is a good price; we tried to get one thousand but could not do it; as it is you will receive the sum of \$855.00 net, being fifty-five more than you asked; if this is satisfactory, you and your husband go before a United States Consul and sign deed in presence of two witnesses and acknowledge the same before the Consul and return to us.

We think that we will be able to sell the Blanco building about the first of June. There is a timber land deal on; if it goes through we will sell the house to Ferry; he is not in the Blanco just now, has leased it for one year; we are working hard on him and doing all we can to help sell the property belonging to you.

We are working on the papers in the lawsuit and will know in a couple of days whether or not we will have to bring the same. Will write you again the first of April and let you know what we do.

Very respectfully yours,

Hall & Hall."

Whereupon said witness further testified that he wrote Dora Herrmann on April 22, 1903, a copy of which letter was offered and admitted in evidence, marked "Defendant's Exhibit I" and read as follows:

"April 22, 1903.

Dora Herrmann,

15 Garten Street, Hanover, Hildersheim, Germany.

Dear Madam

Enclosed herewith find check for \$175.18 also deed to be signed by yourself and husband for the Lewis land to Binger Herman. Our account since last report stands as follows:

DISBURSEMENTS

Jan. 10	W. P. Murphy Repairs	\$ 2.75
Jan. 19	J. W. Carter st. Repairs.....	1.00
Mar. 27	Taxes	234.32
Apr. 1	Hall & Hall fees	21.75
Apr	Check Mrs. Herrmann.....	175.18
		<hr/>
		\$435.00

RECEIPTS

Jan. 7	R. C. Cordes	\$ 15.00
Jan. 26	Peter Clausen	30.00

Feb. 5	R. C. Cordes	15.00
Mar. 12	J. L. Ferrey	60.00
Mar. 10	Peter Clausen	30.00
Mar. 18	R. C. Cordes	15.00
Mar. 28	C. A. Moore	240.00
Mar. 30	Peter Clausen	30.00

Total\$435.00

You will observe that we have got the rent from Moore and Clausen that was behind.

We have filed papers and commenced a foreclosure suit in the case of yourself against the Coos Bay Land Company and Holcomb. Gray neglected to fill in certain parts of the affidavit for publication in the former proceeding which rendered the judgment void. We will have to make some repairs in the building during the next three months.

Very truly yours,

Hall & Hall by John F. Hall.'

Witness further testified that the marks on the letters from Dora Norman Herrmann to himself show the dates on which said letters were received by him. And witness further testified; that he received a letter from Dora Herrmann dated June 7th, 1903, which was offered and admitted in evidence, marked "Defendants' Exhibit J" and read into the record as follows:

"Hildesheim, June 7th, 1903.

Dear Mr. Hall:

Your letter of the 24th of March reached me in due

time and I wish you would send me, as soon as possible that money for the deed from Woodward for 855 dollars. The letter of the 22 of April also, and would be much pleased if you could send me the sum from Binger Herman for Lewis land.

From your last letter I see that you have arranged Holcomb (that section he is claiming). You tell me that you hope to have the chance of selling my hotel, I hope you will do so very soon, but to my interest, and at the same time, not to undertake any great repairs, but only what is just necessary, for I do not wish to have any more trouble with it, and please do your best for me. Mr. Easton wrote several times, and told me he would like to have that land, that Griffin had. If so, I set the price of 2000 dollars. In his last letter he offered 1500 dollars please tell me what you think about it, I feel sure that 2000 is not too much, for you know this land yourself, and I must also know all the way and certainly of payments of all money due me. I of course prefer cash down, but if this is not possible, I must have safe security, and as soon as possible. But if I get cash down I will let off a little of the sum, of course this I leave to your good judgment, and interest for me, the deed can be drawn up at once, if the sale takes place. What your letter of the 14th of May, states, I answer to this, and is, I remember, I asked 15000 dollars, but should the purchaser complain of this sum, I will let it go for 12,000 but not less. And you will kindly send me answer by telegram and if I wish my husband consent to the

sale of the land, we will at once let you know, also by telegram, but I hope I shall not have to wait very long, for I should like to have all settled as soon as possible, but please take care the land is not sold too cheap. I hope you will do all you can for me, and as soon as possible. Please give Mr. Reihard 3 dollars to arrange John's grave.

If my health keeps good and nothing prevents, I may come next summer to Marshfield, I hope now all will soon be arranged, and that you will do all for my interest, and security, in my wishes, and the repairs in the hotel to be as little as possible.

Hoping to hear from you as soon as possible, I close, with best regards from myself and husband, I remain,

Yours truly, Dora Herrmann."

Whereupon said witness further testified; that he wrote Dora Herrmann on July 13th, 1903, a copy of which letter was offered and admitted in evidence, marked "Defendants' Exhibit K" and read into the record as follows:

"Hall & Hall

Attorneys at Law,
Marshfield, Oregon.

Marshfield, Oregon, July 13, 1903.

Mrs. Dora Herrmann,
15 Garten St., Hildesheim,
Hanover, Germany.

Dear Madam:

Enclosed herewith find check for \$639.58 less ex-

change and postage, also we return deed from you to George Beale, this deed was not properly executed, in the following particulars. The deed was not witnesses at all, when the law requires two witnesses, the Notary's certificate is in German it should have been written in English or else a translation of the German into English, properly certified to by the Consul.

We told Mr. Beale that we would have the deed corrected, but he says he will not take the property at all, he has gone back on the bargain. We are negotiating with some other timber men and think there is a possibility that we will be able to set some of them to take the property.

We have been delayed in writing about the Herrman land for the reason that he was away from home when we wrote him that the deed was here. After his return he wished an abstract which took several days before it reached him.

We received the money from Herrman last Saturday July 11, 1903. The boom has about let up. We are doing our best to sell the hotel and may do so before the summer is out, unless the boom breaks the same as in 1890.

In the matter of the Moody or Griffin claim we inclose you deed for a part of the land, on examination of the abstract we find that 80 acres described do not belong to you. It seems that Crawford made a mistake in describing the land that would now belong to you, then when Gray made the mortgage for

Norman he made the same mistake and it was recorded with this same description even to the foreclosure of the mortgage and in your deed, this 80 acres of land we refer to should have been described as the S $\frac{1}{2}$ of the SW $\frac{1}{4}$ of Section Six, instead of the S. $\frac{1}{2}$ of the S E $\frac{1}{4}$ of Section Six.

Mrs. Easton writes us that she is willing to take the land and pay pro rata. In that case she would be paying you for that for which you hold a good title, the sum of \$1482.00 and there would be 5 per cent off that. I would not advise you to take that sum for it. If she will give you \$1800.00 or rather than lose a sale \$1700.00 it would be better for you to take it, then you would still have your equity in the 80 acres, to perfect title to same would cost you at least \$100.00, we will inquire into the value of this particular tract and give the abstract a fair examination and if we find that it would be to your interest, will commence suit. If not we will let you know. It might be well for you and your husband to sign the enclosed deed before a Notary Public and have it attested by a U. S. Consul and return to us with instructions. We will be governed by whatever you say in the premises.

Mrs. Easton will pay cash on the delivery of the deed.

Very respectfully yours,

Hall & Hall."

Whereupon said witness further testified, that he received a letter from Dora Herrmann and Christian

Herrmann, dated August 15, 1903, which was offered and admitted in evidence, marked "Defendants' Exhibit L" and read into the record as follows:

"Mr. Hall:

Many thanks for sending the money. We are very sorry that the deed did not entirely correspond with the judicial notions there, although the consul thought the deed ought to have validity since it was legalized. What a pity, that on account of such a trifle you did not succeed with the sale. We herewith send you the deed of Mr. Easter, which this time will be all right.

Please do try to get 1800 dollars for the land. If that is not possible then at least as much above 1700 dollars as you can get. At any rate on no account I should like the land to be sold for less than 1700 dollars and only for payment in cash. How is it with Sengstacken, is he now willing to buy the land, or what kind of objections has he still against the bargain.

Did you find out the address of Holcomb?

I should be very glad, if at last the land would be sold. Please do take as much pains as possible, we should be much obliged to you. How far did you get with the transactions about the sale of the Sprague's land, is there no chance that it may be sold? Please, give us nearer information about it. Besides, be kind enough as to send us exact account, entering into particulars, about the many expenses, especially about the 37\$ for Bennett, 5\$ for Hazard and 7\$ for

Murphy. I should like much better, if Murphy did not work for me any longer, but Miller. In your account of the sale of my house, last year, you did not mention, what was become of the glass panes, belonging to the windows in the hotel, did you keep them in good care? I hope that in the course of the summer you will succeed in selling my hotel with the remainder of the lands. Please give me soon an exact information about everything, how the things are in my favor or to the contrary, and if I may hope to succeed in selling all my property in your country there? Is there no chance that you can sell my lands on your own account without always sending the deed here, if we can give you a general power of attorney, as our authorized representative?

We are quite well here and I am satisfied with my health. I hope that you and your family are also quite well.

Hoping soon to get a favorable account about everything and with our kindest regards,

Your,

Dora Herrmann and Chr. Herrmann.

Hildersheim, the 15th of August, 1903."

Whereupon said witness further testified that he received a letter from Dora Herrmann of date November 11, 1903, which was offered and admitted in evidence, marked "Defendant's Exhibit M" and read into the record as follows:

"Hildesheim, 11 November, 1903.

"Mr. Hall,

Marshfield,

Many thanks for your letter. As for the sale of the land to Easton I do not quite agree with your arrangements. Since Easton has got the land for such a cheap price, you ought on no account to have exempted him from the taxes for the present year, so much the more so, since, as a matter of course, it was his duty to pay them, as he has always done before. Since he did not pay any rent, he also ought to have paid the abstract. Besides you have put down to my account for the sale \$102.50 commissions money. But since I have sold the land to Easton without your help, you ought only to have charged me for the payment of clerk's and lawyer's fees and not 5% of the money I get for the land. I therefore beg you to regulate the affair accordingly. Herewith we enclose a signed and acknowledged general power of attorney, but now, please, do exert yourself to the utmost for the sale of the hotel and the remaining lands. As your letter informs us, E. R. Dean & Co. have offered to pay 1\$ per thousand for the timber on the land; that would bring about eight to ten thousand \$. But since the barren land, cleared from wood, is of no use to me, only that I should have to pay interest for it, I wish you to sell the whole land for ten to twelve thousand \$ to Dean & Co. Only in case that those gentlemen would not yield at all to the purchase of the whole land, I agree to their getting

the timber for eight to ten thousand \$, and I beg you to give me soon an exact information how, at the sale, the payments will be fixed. Concerning the land in North Marshfield, I leave it to your own judgment to ask for it what you think the real value of it, only try to get for it as much as possible, so that it is a decent price. I hope that you will always act in my special interest and I beg you to give me soon an exact information how much you think you could ask for the land in North Marshfield. How is it with John Matson, is he still at the Coal Bank? If he is there, please, see that you can collect that note. Several times I have already asked, what has become of the big glass windows that were in my small house, you have sold. Until now I did not get any answer, please give me nearer information about it. Here enclosed I also send you Easton's letter to me, that you may see what kind of pretensions he makes. I do not give the quit claim deed asked by Easton. Altogether I will not have anything to do with him, Easton, any more. If you can sell the 80 acres in any other way, I agree to it, and Easton shall not use the land any longer.

Please do write soon about everything.

Looking forward to getting soon a favorable account from you, I remain with kind regards,

Your

Dorette Herrmann.

Address Hildersheim,
Sedanstrasje, 16."

Whereupon said witness further testified that he received a letter from Dora Herrmann, dated February 21, 1904, which was offered in evidence, admitted and marked "Defendants' Exhibit N" and read into the record as follows:

"Hildersheim 21st of February, 1904.

Mr. Hall:

What is the reason that you do not write and send the money? You ought to send it every months, now it is nearly five months and I did not get any money. Please do send it immediately, I am building and therefore need the money. Neither do you answer the questions I asked you. I always read in the newspaper that so much land is sold there, what is the reason you never sell mine? And how is it with the Blanco? You promised so long ago and you never sold it yet. Then about the glass windows that were in the house on the hill, what have you done with them? Please do try to sell something and do write what is the reason that you did not yet sell anything. Is the price too high or is there anything else the matter? I thought Mr. Charles Merchants was going to buy it? You told me he intended to buy the timber land, did he not buy it after all or what is the reason, that he does not want it?

Besides do also let me know how it is with Holcomb's claim, you never told me about it and I wish to know if Henry is still willing to take the land.

Please answer immediately, you oblige me very

with it. I expect to get a letter as soon as possible.

With kind regards,

Dora Herrmann."

Whereupon said witness further testified that he wrote Mrs. Herrmann on May 7th, 1904, a copy of which letter was offered and admitted in evidence, marked "Defendant's Exhibit O" and read as follows:

"Hall & Hall,

Attorneys at Law,

Marshfield, Oregon.

May 7th, 1904.

Dora Herrmann,

15 Garten St.,

Hanover, Hildesheim, Germany.

Dear Madam:

Enclosed herewith find check for \$89.82. We have collected money on your account as follows, since last report: Peter Clausen, rent for February and March, \$30.00, J. W. Bonebrake, rent for February March, \$30.00, C. A. Moore, rent January, February and March, \$120.00, W. H. Short January and February \$60.00, making a total of \$240.00. We have disbursed as follows: J. H. Miller, repairs \$1.25, Stephen Gallier, Sheriff, cost of publishing notice of execution sale Holcomb property \$19.90. Coos County, one-half taxes for 1903, \$110.75, Dean Lumber Co. lumber and repairs on street \$6,28. Hall & Hall fees 5 per cent of the amount collected \$12.00, check herewith \$89.82, Total \$240.00. The Holcomb property,

as we wrote you before, was sold under execution, and we bid it in again for you and the sale was confirmed at the last term of the Circuit Court, that is, last week, you will get a second deed for same in four months, then your title will be good. The court allowed us \$150.00 for attorney's fees in the foreclosure proceedings. We have not taken any out of your rent, but will wait awhile, and see if we can sell the property.

You will note that you only received \$60.00 on the Short account rent of Blanco rooms. Short failed in the hotel, and got the best of us in one month's rents, before we could get in possession. We will probably get it yet, as he has promised to turn an account over to us.

As we wrote to you, some time ago, we will have to make some repairs on the building, the under-pinning has about rotted away, and it will cost something to get it repaired.

We have also made a bargain with a man to rent what is known as the Sample Rooms, joining the rooms held by Clay Moore. The party will go in, in June.

Times are pretty dull here at present, and we don't look for anything better, till after the "Presidential Election."

Very truly yours,

Hall & Hall."

Whereupon said witness testified that the tract of land referred to in this correspondence as the Hol-

comb land, is the property involved in this suit.

Whereupon said witness further testified:

That he received a letter from Dora Herrmann dated May 12th, 1904, which was offered in evidence, admitted and marked "Defendants' Exhibit P" and read into the record as follows:

"Mr. Hall:

What is the matter that this time again I did not get the money, did you again send it to Hanover? I told you to send the money every three months regularly, as we really want the money. Do write whether you did not sell any land or the house yet. I should like so much to know what is the reason, that you do not sell anything, as you always promised to do so. Is the price too high? Or what is the reason? Do write about everything. How is it with the Holcomb's claim? I read in the newspaper, that the sale is confirmed, but I never get any answer about that from you. Please answer as soon as possible and send me the money.

With kind regards for you from me and my husband,

Dora Herrmann.

Hildesheim May 12th, 1904.

Our address is now, Mrs. Dora Herrmann,
Sandanstrasje 16, Hildesheim, Provinz Hannover,
Germany."

Whereupon said witness further testified that he wrote Dora Herrmann on June 1st, 1904, a copy of

which letter was offered in evidence, admitted, marked "Defendants' Exhibit Q" and read into the evidence as follows:

"Hall & Hall

Attorneys at Law,

Marshfield, Oregon.

June 1st, 1904.

Dora Herrmann,

Sedanstrasje, 16,

Hildesheim, Provinz Hanover, Germany.

Dear Madame:

Replying to yours of the 12th will say, that we mailed you check on May 7th, 1904.

We were delayed in collecting the rent as stated in our letter, also by rush of work preparing for Court. We will try and get the rent, so as to remit regularly every three months.

We could not sell your land, have did the best we could, the only people who are buying land are speculators. They want to get the land for nothing so as they can sell at a big price.

There is some talk of a railroad along the coast; if this goes through, the chances, that we will be able to sell the land, for you, this fall. In the matter of the Holcomb, we wrote you in our last letter. You have evidently, have missed, one or two of our letters, as we wrote you once, either in March or February, stating, that the price for the town property was too high. We will sell the property as soon as we

can find a purchaser.

With kind regards,

We are very truly yours,

Hall & Hall, by John F. Hall."

Whereupon said witness further testified that he wrote Mrs. Herrmann again on the 7th of July, 1904, a copy of which letter was offered and admitted in evidence, marked "Defendants' Exhibit R" and read into the record as follows:

"Hall & Hall,

Attorneys at Law,

Marshfield, Oregon.

July 7th, 1904.

Mrs. Dora Herrmann,

Ledanstransje 16,

Hildesheim, Provinz Hanover, Germany.

Dear Madam:

Enclosed herewith find check for the sum of \$290.00. Our account stands since last report as follows:

Receipts—

Rents:

Peter Clausen, 4 mo. at \$15	\$ 60.00
E. G. Flanagan, for Blanco rooms, Apr. May	
June	90.00
J. W. Bonebrake, 4 mo.	60.00
C. A. Moore, 3 mo.	120.00

Total.....\$330.00

We have disbursed money as follows:

April 18	The Sun, one year's subscription....\$	3.00
May 18	C. A. Johnson, repairs on building	8.00
	Hall & Hall, collection fees.....	16.50
July	Pete Gulvason, repairs	5.00
July 7	Check herewith	290.00
	Balance in our hands.....	7.50

Total..... 330.00

There is due S. C. Brown for repairs something like \$7.00 and for that reason we have retained the amount mentioned. As we wrote you before, it will be necessary to make some repairs before wet weather sets in. I do not know just what these repairs will cost but the under-pinning is about gone, and the costs will be somewheres in the neighborhood of from \$150.00 to \$200.00. We will get it done as cheap as we can, and have a good job. We have been expecting to hear from you about it.

In regard to the Holcomb claim the sale has been confirmed and you will get a new deed in the latter part of August. After this your title will be perfect. Times are pretty dull here at present in fact there is no demand for property. We will do our best to make a sale.

Very truly yours,
Hall & Hall, by John F. Hall."

Whereupon witness further testified that he wrote a letter to Dora Herrmann on August 3, 1904, a copy of which was offered and admitted in evidence, marked "Defendant's Exhibit S" and read as follows:

"Hall & Hall

Attorney at Law

Marshfield, Oregon.

August 3, 1904.

Dora Herrmann,

Ledanstrasje 16,

Provinz Hanover, Germany.

Dear Madam:

We have been requested to write you concerning the timber on the Sprague claim by Messrs. Bradbury and King who have been logging for both Simpson and Dean Lumber Co. They wish to log the land. Bradbury says that at \$1 per thousand stumpage there is something like \$6,000 worth of timber on the land. They wish to begin logging next spring and to take the timber off as fast as they can, which they state will take five years to remove, stumpage to be kept out by the mill company that received the logs, and turned over to us or to any other agent you may have. We promised to write you and lay the matter before you. We think it is a good proposition if they go on logging in the manner in which they wish to do, you would get something like \$1600.00 a year. We have been trying to sell the land but can not do it. Lumber business is very dull here at present but we hope to see better times next year. If the timber is removed the land will still be valuable as coal land, and if the Beaver Hill Coal Co. keeps working as the present indication indicate your land will be well worth as much for coal as it would be with the timber still on. Let us know whether or not you will ac-

cept this proposition. If they log the land they will begin early next spring.

In the matter of the Holcomb claim as we wrote you before the time for the sheriff's deed will not expire until about the 27th of August. We have an offer of \$3500.00 for the land provided the party that makes the offer can dispose of some property he owns in Portland. We told him we had your power of attorney but would not make any promise concerning the price of the land until we heard from you. You will please let us know your lowest cash price for the land also your lowest price $\frac{1}{2}$ cash and $\frac{1}{2}$ on time.

As to the Blanco building they are having some trouble there. Emerson Ferry had a chattel mortgage on the Short furniture purchased from James Ferry and has commenced proceedings to foreclose and has moved it out of the hotel. Flanagan says he intends to continue business and will pay the rent along until he gets the house re-furnished. Peter Clausen is moving today but I have another tenant within a few days for the part occupied by him.

Hoping to hear from you soon with instructions, we are,

Very truly yours,

Hall & Hall, by John F. Hall."

Whereupon said witness further testified that he received a letter from Mrs. Dora Herrmann dated August 10, 1904, which was offered and admitted in evidence, marked "Defendant's Exhibit T" and read as follows:

"Hildesheim, the 10th of August, 1904.

Mr. Hall:

Your letters of the 7th of March and the 7th of July as well as the check I have got and I thank you very much for it.

As I see from your letter there have been many expenses for the land. Was it necessary that it was sold once more by the sheriff? We had it already since 1896, John had bought it. How was it that I have to pay so much for it? That is quite terrible. Please do your best that you get the money from Schort, for he is a good-for-nothing fellow. You told me in your letter that you had let the Sampel from the 1st of June, who is in it now? And how is it with the hotel, have you let it or has Ferry taken it again? Please do try to sell it, even though you should be obliged to give it a little cheaper. You always promise, but that is all, you do not get on with the things.

You write the house ought to be underpinned. Just get it done, if it is necessary, but see that it is well done and that it does not cost so much money. Please write all the particulars about it, and how the things are going on there. Can you not sell anything at all? Is John Matzen back again? Please, do try to get the money from John, or ask his wife for it, she always gets money from him, or do write a sharp letter to him, for I should like very much to have the money.

Please do write soon about everything and give me all the particulars.

Kind regards to you and your family from my hus-

band and me. I hope that you are quite well.

In the hope of getting soon a favorable answer,

Your

Dora Herrmann.

My address is Sedan Strasje and not as you write Ledan Str."

Whereupon said witness further testified that he received a letter from Dora Herrmann dated August 29, 1904, which was offered and admitted in evidence, marked "Defendant's Exhibit U" and read as follows:

"Hildesheim the 29th August, 1904.

Dear Mr. Hall:

I received your letter and was very pleased to learn by it that Bradbury and King intend to buy the land and will log it. I should have been very happy if you could have sold the whole land. I consent, that they log the land also that after five years, you sell the land as coal land.

I wish the land to be logged in five years, and a yearly payment of \$1600. To prevent them that they do not pick out the best trees, leave the others, cease the payment after two or three years after having logged out the best ones, I wish that you would kindly assure this by a written contract with these three conditions. The land sold for 8000 dollars, the yearly payment must be executed in rates at 1600 dollars yearly. In the matter of the Holcomb claim, I consent to sell it for 4,000 dollars, see what you get, if he does not agree with this, you could arrange the matter so that the 500 dollars are divided, he giving 250 dol-

lars more and I only 3750 instead of 4000 dollars to receive. I hope that the deed for the claim will be all right.

Now, about the Blanco building, you write there is some trouble. I hope it will be going all right with this business, and the rent will be paid regular.

I am pleased that you have another tenant for Clausen. I told you in my last letter that you go on with the stringers under the house, please see that you can get it as cheap as possible, and that you get a good worker for to do it. You will kindly look to it all, as I place all in your care and I hope to receive soon news from you.

I remain,

Yours most sincerely,

Dora Herrmann."

Whereupon said witness further testified that he received a letter from Dora Herrmann dated November 17, 1904, which was offered and admitted in evidence, marked "Defendant's Exhibit V" and read as follows:

"Hildesheim, Nov. 17th, 1904.

Mr. Hall:

Dear sir:

What is the matter that you do not write to me at all? I am waiting already such a long time for an information about my affairs. How is with the hotel is the work done, and who is the tenant of it now? You told me you had let the sempel now, but I did not get any rent for it yet? And how is it with the

lot at the end of the street you told me about? Did you make a bargain with the logging? And did you get the deed from Holcomb? Please do take pains to sell something of my property, you always promise but that is all, and I should like it so much. A. D. Border has written me about the Blanco Hotel, I have told him to apply to you for it. The cash price I had fixed for it was 9500\$. In case he should sell it, take care he does not get the money, but cause the party to pay the money to your own self. Please do write soon and give me information how everything is getting on there. And once more, do try as much as possible to sell something, you would oblige me so very much by it.

In the hope of getting soon a favorable answer from you and an exact information about everything,

I remain, Very respectfully,

Dora Herrmann."

Whereupon said witness further testified that he wrote Dora Herrmann a letter on January 28, 1905, a copy of which was offered and admitted in evidence, marked "Defendant's Exhibit W" and read as follows:

"Hall & Hall

Attorneys at Law,

Marshfield, Oregon.

Marshfield, Oregon, Jan. 28th, 1905.

Dora Herrmann,

Sedan Street,

Hildesheim, Hanover, Germany.

Dear Madam: Enclosed herewith find check for the sum of \$209.24, the amount due for rents at January 1st, 1905. We have received the following sums for you since last report,

Kelley rent of barber shop.....	\$ 30.00	
Mrs. Heisner rent sample room.....	15.00	
B. A. Curry rent of barber shop.....	12.50	
J. W. Bonebrake rent	41.00	
C. A. Moore rent	120.00	
Ferry & Flanagan rent upper rooms	90.00	
Ferry & Flanagan rent sample rooms	15.00	
Total receipts		\$323.50

We have paid out the following sums:

C. W. Tribbey labor	\$ 14.50
S. C. Brown labor	4.85
C. E. Nicholson material	52.25
G. Gould surveying	26.50
Hall & Hall fee 5% on money collected	16.16
Check herewith	209.24

Total herewith	\$323.50
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You will observe that there is an item of \$26.50 for survey, we were told that Seeley was logging your land and had a survey made to find whether or not the report was true, we find that he had taken something like two hundred thousand feet and have called on him for the money, and we will get it in a short time, as soon as we receive the stumpage money we will remit it to you.

We have the Holcomb matter so that we can get a

Sheriff's deed at any time. In regard to the lot at the end of the street, we have not got anything out of it as the title is in question, and we would not advise you to put any expense on it, if you can sell it for anything you can say that you have found that much money.

We have been trying to sell the hotel and may do so in the spring at the last price given by you, towit, \$9500.00, that is much less than we had it before.

We are trying to sell the Holcomb land for four thousand dollars if that is satisfactory to you, but do not know whether or not we can do it. Times are pretty dull here just now, only the North Bend and Porter Mill running.

Hoping that this will be satisfactory, with kind regards to yourself and husband, we are,

Very truly yours,

Hall & Hall by John F. Hall."

Whereupon said witness further testified as follows:

That he received a letter from Mrs. Herrmann dated April 13th, 1905, which was offered in evidence, admitted, marked "Defendants Exhibit X" and read as follows:

"Mr. Hall:

Your letter and check safely arrived here, and I thank you very much for it. I did not hear anything from you for a long time. You would do me a great favor if you could write oftener, as I wish so much

to know how things are getting on there. Therefore, please, do soon write again. Is there no possibility at all for you to sell anything? I will give away the Blanco Hotel for 9,000 dollars and I shall be contented if I get 4,000 for the Holcomb place. Please do try to get the money for the stumpage from Seely, for he is very tedious in paying the place down in Marshfield. About the place at the end of Marshfield, you have got the title and we have got the deed for it. What do you think the real value of it, for how much should I give it away? Please, let me know your opinion about it. At any rate, please do your best and try to sell something. Has there not been anybody at all who wished to buy anything of the property, and did no one offer a price for it? Perhaps Flanigan would buy it.

Are they going to begin with the logging off the wood, or have they given it up again? When they begin you must insist upon their giving you good security.

Dis Sport already pay the 30 dollars which he owed for rent? Is John Malzen not yet there, or his wife, that he may pay the rent? If he is not, give me the address, that I shall write to him myself.

Please give 2 dollars to Mrs. Reickherd that she may look after John's grave this summer.

I hope that next time you will be able to give me very good news, that you have sold something, or that you have got the money.

Kind regards from my husband and me for you

and your family. Please, do soon write to me and give me an information about everything.

Wours respectfully,

Dora Herrmann.

Hildesheim, April 13th, 1905.

Sedanstrasje."

Whereupon said witness further testified as follows:

That he wrote Mrs. Herrmann on May 19th, 1905, a copy of which letter was offered and admitted in evidence, marked "Defendants' Exhibit Y" and read into the record as follows:

"Hall & Hall

Attorneys at law,

Marshfield, Oregon.

May 19, 1905.

Dora Herrmann,

Tedan Street,

Hildesheim, Hanover, Germany.

Dear Madam:

Enclased herewith find check for the sum of \$165.96, we have collected since last report the sum of \$317.50, as follows:

D. A. Curry rent of barber shop.....	\$ 60.00 to May 1
Ferry Flanagan	120.00
C. A. Moore	120.00
J. W. Bonebrake	17.50
Total.....	\$317.50

We have paid out the following sums, to-wit:

A. J. Savage, repairs on building.....	5.70
Taxes one-half amount	125.97

J. A. Luse subscription to Sun.....	3.00
Hall & Hall 5% amount collected....	16.87
Check herewith	165.96
Total.....	\$317.50

We have contracted the timber off the Sprague claim to Bradbury & Pierce, for One Dollar per thousand, they commence work the first of June, and in the agreement they are to take at least sixteen hundred thousand feet each until year until the timber is all off, to have five years in which to remove the timber, you will begin to get returns from there this fall. We have a party looking at the Blanco building, but have not yet come to an agreement, the party is trying to collect some money due him. If he can collect he says that he will give Nine Thousand Dollars for the building, one half in cash, and one half on note and mortgage, payable in two years, with interest at 6%. We told him that we would have to write to you before giving an answer, we told him you might take that sum in cash, but could not say as to time. Our commission for making the sale would come out of purchase price. If you can get that sum would advise you to take it, as there will be at least five hundred dollars in repairs to be made before winter. There is now considerable talk about land and we have a good prospect of selling the Holcomb tract for four thousand dollars. We had to get Bonebrake out of the building, he had gone bankrupt. But we have now another tenant who will take the room.

Hoping that this will be satisfactory to you, we are,

Very truly yours,

Hall & Hall."

Whereupon said witness further testified that he received a letter from Dora Herrmann, dated June 12, 1905, which was offered and admitted in evidence, marked "Defendant's Exhibit Z" and read as follows:

"June 12, 1905.

Mr. John Hall,
Marshfield.

Your letter of the 19th of May with check safely arrived here and I thank you very much for it as for the contract with Bradbury & Pierce, I agree to it, that for every thousand feet a dollar is paid. I must only ask you to insist on the money being always paid punctually at the proper time. Besides I should like to know how it is with the money for the wood, which at the time Mr. Seely has cut down without permission. You promised to cash it. I hope to get the money already this time, and I ask you to arrange the matter at once.

As to the Blanco hotel, I perfectly agree to the price of 9,000\$ and the proposed terms and sum of payment. I should like very much if at length the matter would come to an end now.

I am also satisfied with the sale of the Holcomb land for 4000 Dollars. You would really oblige me

very much if you would apply to the affair very energetically, that now at length all my possessions there would be sold. The continual promises you give me in all your letters are really of no use for me. Is the 30\$ from Short not yet collected? Please do tell me, if the remaining 80 acres by Dora could not also be taken at a reasonable price by the last purchaser, perhaps he is still willing to buy the land.

I have read in the newspaper that there is a great demand for hardwood, could you not perhaps sell the Wentworth claim? Please do not send the quarterly account so late, we never know what to think of it. Your last letter arrived at the beginning of June instead of at the end of April. I am looking forward to an answer soon. Please do give me a detailed account about everything. Many thanks for the trouble you take.

With kind regards,

Dora Herrmann."

Hildesheim the 12th of June, 1905. Sedanstrasje 16."

Whereupon said witness further testified that he received a letter from Christian Herrmann, not dated, which was offered and admitted in evidence, marked "Defendants' Exhibit AA" and read into the record as follows:

"Dear sir:

I received your letter of the 28th November and thank you very much for all the sympathy you take in my bereavement, also for all the explanations you

give me about the property left to me by my dear wife. I enclosed to this letter I send you, sir, first a certificate by the clerk of the court proving our marriage settlement, and secondly the probate proceeding by which I am in full power to enter into the inheritance of my wife without delay. Here in Germany I took possession of all my wife left me immediately after her death and had nothing, no interest to pay to the government. Why should you apply, sir, for letters of administration after hearing of my wife's death? As you were the only administrator of the estate during my wife's living and since I overtook the inheritance all will be just the same, what difference can there be? All can continue just the same, all, goes over to me, why there will be no chagement at all. All these expenses which you enumerated in your writing I hope could be prevented, if business affairs and everything continued just the same as during my wife's living. Would you kindly tell me, sir, why you apply for them. I think no chagement ought to take place. If cause, sir, you know all about that better than I and what is best to do for my interest, I confide entirely in you, sir, I hope these two certificates will show you all that is necessary, if not, would you kindly inform me as soon as possible.

The explanations you gave me about the property agree almost with those my wife gave me about it. When will the railroad take the timber out to the water? Was a long time it wants to get it done.

Please tell me also who controls the timber and the number of feet of lumber? Do they take out exactly what is due to them, and do they pay me exactly what is due to me? Would you have the kindness to inform me exactly about and over all, so that it would give me a full view over my affairs and claims?

As I know you such a clever administrator of my estate, sir, I am sure you would be able to get anything out of that small piece of tide land. My wife often and even during her illness talked with me about her property in America, and I remember perfectly well that she told me she had a positive claim on it and it was worth 500 dollars.

As to the hotel property I am quite astonished to hear that this affair is not yet quite settled.

I do not know, sir, what kind of deed to the interest claimed by Sengstacken you can mean, sir, I cannot find any deed about that amongst my papers, are you sure that my wife had a deed of this affair in her possession? Though my wife persuaded me that Sengstacken had no right to claim anything. Can he prove it? Can he bring you any means of proving? If he had already lawfully claims, why did he not claim them after the death of Mr. Normann, as his will was read out? At all cases I think that beforehand we must not pay any interest to Sengstacken, but you will do the right sir, and act in my interest. If we cannot make him understand this affair, we would perhaps ask the assistance of the German Consulate, please do act energetically for me.

How is it with the revenues of the Blanco Hotel for the months of July, August and September? The hotel has been sold on the 1st of October, there must be those revenues in store for me. I hope, sir, you did not pay with that money the reparations made on the hotel, it would have been against my consent, since the hotel was to be sold. Please give me a little light also in this affair.

Would you send me a copy of the contracts over the sales of the Holcomb land and the Blanco property certified by the clerk of the Court?

Hoping, sir, that you may be able and contrive to arrange all my affairs for the best and for my interest, I remain,

Very truly yours,

Ch. Herrmann.

P. S. If you think it necessary, sir, to arrange my affairs more easily, I could very well come over in spring and see to them."

Whereupon said witness further testified as follows:

Q. Do these letters which have been introduced in evidence include all the correspondence between yourself or the firm of Hall & Hall, and Dora Herrmann or Christian Herrmann, having any reference whatever to the sale of the Holcomb tract?

A. They do.

Q. I say, are they all the letters?

A. All the original correspondence.

Q. Now what effort did you make to sell this

property?

A. We were trying about five or six years to sell it, and when Mrs. Herrmann went away first she left the property for me to sell, the Holcomb tract; the first time for \$2000. She went to San Francisco, when she came back she thought it strange we had been unable to sell it. I told her we had been unable to get any purchaser, but if she could get anyone to buy it they would give \$3000 as well as \$2000, and we raised the price to \$3000.

Q. Was that raised at your suggestion?

A. At my suggestion. She raised the price one thousand dollars at my suggestion, and she went to Germany and returned; was there probably a year, I don't know just how long; she was in California part of the time, and part of the time in Germany. When she went away she told me if I could sell for \$3000 to sell the property, and she instructed me if I thought it was worth more to raise it, and so I raised the price. Some time about 1903 or 1904—I guess 1903, before this second suit was commenced, Mr. Sengstacken came to me and wanted to buy the property, I gave him a price, and he said he thought he could do better, or words to that effect, and he wrote her or wired her, and she sold it to him for less than what I was asking. When he got the abstract and went to examine the title, the title was turned down—I believe Mr. Sehlbrede was the attorney, I am not sure, but anyway his attorney turned it down for the reason that the affidavit for publication wasn't suf-

ficient, and I wrote to Mr. Walters, that was her agent, at that time we sent everything through Mr. Walters. And later on I think it sold—went to judgment and the property was advertised again by the sheriff and bid in for \$3017, I think, whatever she had against it. We bid it in for just what her claim was.

Q. What was the date of that public sale?

A. It was between January and April, for the sale was confirmed at the April term in May.

COURT: 1904?

A. 1904.

Mr. PECK: We can stipulate the date of that sale can't we?

Mr. ST. RAYNOR: Yes. It was in March, 1904.

A. I think the sale was in March; sometime between January and April.

Mr. JECK: The sale was in March, 1904.

Q. Were there any other bidders for the property at that time?

A. No other bidders.

Q. Then what did you do to attempt a sale?

A. Then we tried—I tried to sell to different parties, and there was a man by the name of Young came down from Portland, and I tried to sell to him, and he said he had property up here—if he could dispose of his property he would take it. He wanted—I think he wanted to beat me down, but he talked as though he would take it at \$4000.

Q. Was he the gentleman you referred to in the correspondence as offering \$3500?

A. No, that was another man that offered \$3500. This Young was the man I wrote about in January, 1905, and we didn't—he couldn't make it, and this \$3500 man was a timber man; I really don't know as I could recall the name, now, because they were doing the work through my brother, that is, trying to buy the land, but they offered \$3500. That was 1904. I wrote her about that, you see what she said. Then there were a number of parties; I tried to sell it to Mr. Bennett, I went to Mr. Kauffman—he was in the real estate business—I asked him if he could get a purchaser for it; different parties. I couldn't get anybody that would take it. The land had been logged off; it wasn't fit for farm purposes, very little timber; in fact at that time they wouldn't take the timber at all, hardly, and we were unable to sell it until we got this deal.

Q. When were the final negotiations instituted resulting in this transfer?

A. It was in May, 1905.

Q. For the purpose of refreshing your memory as to dates, I hand you a promissory note taken from the possession of Henry Sengstacken, dated Marshfield, May 17, 1905, for \$100, payable to the order of Hall & Hall, and ask you to examine that and then state if you can when the first negotiations were made resulting in the sale of this property.

A. Well, the negotiations probably a few days before this letter—before this note was made, but on this date we closed the deal; I sold the property,

agreed to sell it to Sengstacken and Smith.

Mr. ST. RAYNOR: Wait a minute; excuse me, I would like to know if there was any written agreement.

COURT: Ask him about that.

Mr. ST. RAYNOR: I object to any oral testimony being given of the nature of the sale of this property.

COURT: He is not proving title, he is proving when negotiations began. This doesn't prove title of course.

Q. Do you recognize this note?

A. I recognize this note except this handwriting there; that wasn't made that day, but the note itself, I recognize the note as being—

COURT: What date is that?

A. May 17th, 1905.

Q. That is, the handwriting across the face, "Paid on purchase of land, Mrs. Dora Hermann." You don't recognize that?

A. No, I don't recognize that, no.

Q. Well where did you ever see that note before?

A. That note was given to me by Mr. Smith and Mr. Sengstacken on May 17th, 1905.

Q. For what purpose?

A. On the purchase price of the Hermann claim—the Holcomb claim.

Q. At what price?

A. \$4400.

Q. Was this note signed and by whom?

A. Henry Sengstacken and L. D. Smith.

Mr. PECK: We offer the same in evidence.

Mr. ST. RAYNOR: We object on the ground that it is incompetent.

COURT: Objection overruled.

Mr. ST. RAYNOR: It is not the best evidence of a transaction for the sale of realty, and is irrelevant in this case.

COURT: The objection will be overruled and it will be put in the record.

Note marked "Defendant's Exhibit BB." (Which is hereto attached and made a part hereof.)

Q. Was there any written memorandum made at the time, signed by yourself, in the nature of a contract or receipt, or otherwise, with reference to this transaction?

A. I made out a receipt for \$100 on the purchase price of this particular tract of land.

Q. Where is that receipt?

A. I gave it to Mr. Sengstacken, I haven't seen it since.

Q. Did he surrender it to you when the transaction was finally consummated?

A. He did not.

Q. Have you made a search for that paper?

A. I looked over my office and I haven't got it there, and I don't have any recollection of his ever returning it to me; I don't think he did. In fact I am positive it wasn't returned.

Q. Were there any conditions attached to this sale

of any nature?

Mr. ST. RAYNOR: I object to any testimony of an oral nature.

COURT: I haven't seen the bill of complaint in this case, but I understand you are charging actual fraud; you are charging that this land was purchased by these people by actual fraud.

Mr. ST. RAYNOR: We charge that they pretended to purchase the land the 30th of August, 1905.

COURT: This you charge was a fraudulent transaction?

Mr. ST. RAYNOR: We also charge it as a fraudulent transaction, between a fiduciary agent—between a principal and agent. The agent reserving at the time of sale—

COURT: You base your right to recover in this case solely on the fact that Hall was the agent of Mrs. Herrmann?

Mr. ST. RAYNOR: No, that is only one of the grounds.

COURT: The other ground is the actual fraud?

Mr. ST. RAYNOR: The other ground is the actual fraud.

COURT: Very well, then it is quite important that we should know all the facts, and this evidence is perfectly competent if that is the charge.

Mr. ST. RAYNOR: What we object to in this, however, is for the defendant attempting to prove by oral testimony that there was an oral agreement between Mr. Hall, as the attorney in fact of Mr. and

Mrs. Herrmann, and Mr. Sengstacken and Mr. Smith, in selling this property. It is in contravention of the statute.

COURT: Certainly it probably would not amount to a legal contract, but as a fact in this case, as it bears on the question of fraud, and for that purpose, it is competent.

Mr. PECK: I will withdraw the question.

Q. What was done in the matter of the title at that time?

A. Well, the sale was made subject to the title. If the title was good they was to take the land, and I told Mr. Sengstacken that I wanted him to have the papers examined before we went to any further expense.

Q. That is you mean the—

A. That is, he had had the abstract up to the beginning of the foreclosure proceedings. I wanted him to go through the whole thing, have the papers examined, and if they were satisfactory—we would procure the abstract, and if the title was all right, the sale was made.

Q. What next did you hear from either Sengstacken or Smith?

A. Well, it was some time later on, along about August, I think, you see I went away in June, and was gone until the first of July, and after I returned I was talking to Mr. Sengstacken and I asked him what had been done about it, and he said that Mr. Sehlbrede was looking at the papers; and later he

told me he wanted an abstract, and I ordered the abstract, and we got the abstract sometime in the early part of August, I don't remember just the date—no, the abstract must have been a little later. They went through the papers in the early part of August, they finished the papers. Then we ordered the abstract, and we got that about the middle of August, and then later on the deed was made and we had the abstract brought down to date.

Q. By the deed you mean the sheriff's deed?

A. No—sheriff's deed was made, yes.

Q. That was an exception that Judge Sehlbrede found in the title at that time—the lack of a sheriff's deed?

A. Something of that kind. Of course we knew the sheriff's deed hadn't been made at the time and we had them look it over the second time—at the time we ordered the abstract.

Mr. PECK: Can't we stipulate that the sheriff's deed was filed August 24th?

Mr. ST. RAYNOR: What sheriff's deed was that?

COURT: Under the second foreclosure.

Mr. ST. RAYNOR: I don't know anything about the date of it at all.

Mr. PECK: Here is the abstract.

Mr. ST. RAYNOR: Whatever the abstract shows is all right.

Mr. PECK: It is stipulated that the deed was made and filed for record on August 24, 1905, being sheriff's deed of the second foreclosure sale on this

property.

Mr. ST. RAYNOR: Have you got the book it was recorded in?

Mr. PECK: Yes, the whole business is there, you want it?

Mr. ST. RAYNOR: We might put it in.

Mr. PECK: Recorded Book 41, page 320, of the Records of Deeds of Coos County, Oregon.

Q. Now when did you first hear anything about any syndicate being formed by Mr. Sengstacken and Mr. Smith, as alleged in the answer in this case?

A. Well, now, I don't remember the date, but I think it was in July; possibly August, but I think it was in July.

Q. What did you hear about that? What was the understanding in that regard?

A. Well, I was talking to Mr. Sengstacken about it, and he said he was going to get some other parties in with him, and was going to form a syndicate and take it together, and that—I think it was in July, and later on he told me that he had—it was all taken up—all the shares were taken up, and on the date, that is, the 30th of August, Mr. Rogers came in and paid me—

Q. Which Rogers?

A. S. C. Rogers; we generally call him Stephen Rogers. He came into the office and paid me three hundred and sixty-six dollars and some cents, and at the same time, Mr. Clinkinbeard came in and paid a like amount, and later Mr. Sengstacken came in and

he said that one of the parties that was to take an interest in the property had gone back, and wanted me to take an interest in it.

Q. Did he say who that was?

A. Well, I am not sure now. My brother was there; he says he said it was Herbert Rogers, but I have no recollection whether it was Herbert Rogers or not, but he said one party went back, and he wanted me to take an interest in it.

Q. Did Mr. Sengstacken pay any money in at that time?

A. He did, he gave me a check.

Q. How much did he pay in at that itme? Will you refer to your books of that date?

A. Clinkinbeard paid \$366.65; Rogers \$366.65; Sengstacken the total amount he paid in was \$1466.70. He didn't quite give me all that money, but that is what we gave him credit for, and the check was for some five hundred and some odd dollars, and I had him to make up the rest the next day.

Q. Did he have some money for Smith—did he pay money for Smith and Rood?

A. He paid for others, I don't know who the other parties were. In my book I made it "others." I didn't know who the other parties were at the time.

Q. And that was the reason you credited it in your book as "others?"

A. Yes, sir.

Q. Because you didn't know the other parties?

A. I didn't know who they were. Mr. Sengstack-

en had told me probably two or three days before, I don't know just how many, that the parties buying the property—that the title was to be made to the Title Guaranty & Abstract Company, and I didn't know who the other parties were that were purchasing, other than Mr. Smith; that is, I didn't know Mr. Rogers was in it until he came in to make the payment.

Q. I will ask you to examine Plaintiff's Exhibit 16, and state if that is a correct copy of the book item which you made and entered as of that month, at the time of the transaction?

A. Yes sir, that is a copy of the book—copied right from the book.

Q. What did you tell Mr. Sengstacken when he suggested that you take this Rogers interest?

A. I told him I didn't think I could do it. My brother was interested in it or in the fee. Mr. Sengstacken figured that our commission would come out of it, and it wouldn't cost us anything. I said I couldn't agree to do that until I consulted Tom, because I didn't know whether he would stand it or not. He had been hurrying me up, in fact had objected to my sending the rent, when she was owing us for the foreclosure suit, and I told him I would let him know the next morning. I thought probably I would do it. The next morning he came in and I told him—I talked it over with Tom the night before—and I told him we would take this share.

Q. When, with reference to this conversation with

Mr. Sengstacken, did you execute the deed?

A. Well, the deed was delivered on the 30th. I don't know whether we wrote it that day, or whether we wrote it before. The deed would show the date, but I think the deed was executed on the 30th.

Q. Do you remember whether or not it was executed at the time Rogers and Clinkinbeard paid their money in?

A. The deed had been executed at that time, yes.

Q. Do you remember reading it to Clinkinbeard and Rogers? Or anything of that kind? Do you remember if they examined it?

A. No, they didn't examine it, they just asked if it was made out.

Q. Now did you take this interest in this property?

A. Took an interest, yes.

Q. Why?

A. Well, after talking it over with Sengstacken that night and with my brother the next day, why, we didn't want to hang the matter up. Of course if they didn't pay the money then, we would have to commence a suit to enforce it, and we didn't have to pay out any money; in fact there was a little coming to us after paying the interest we would take, and I told my brother we would take it.

Q. Then after that what evidence did you receive from the Title Guaranty & Abstract Company of your investment?

A. On October 2nd I got a certificate from the

Title Guaranty & Abstract Company showing what my interest was. (Handing paper to attorney.)

Q. Is this the certificate?

A. Yes, that is it.

Q. That you received as evidence of your interest in the purchase?

A. For my interest in the purchase, yes.

Mr. PECK: We will offer this in evidence.

Marked "Defendant's Exhibit CC". (Which is hereto attached and made a part hereof.)

Mr. PECK: We don't care anything about having it read into the record.

COURT: It is the same as the one plaintiff offered.

Mr. PECK: No, plaintiff has not offered any; they were just looking for it.

COURT: It is agreed that certificates were issued by the abstract company to all these people, showing their interests.

Q. I hand you Defendant's Exhibit CC, and ask you if that is your endorsement on the same?

A. This on the back?

Q. Yes.

A. It is.

Q. And is this the evidence of an assignment of one-half of your interest in this property to J. T. Hall?

A. Yes, that is all the evidence there is.

Q. One-half interest in the certificate I should say. Handing you plaintiff's Exhibit 1, is that your

letter notifying Mrs. Dora Herrmann of the purchase?

A. This is the letter notifying her the sale had been completed, and the amount received, and the amount retained by me.

Q. Why didn't you mention in this letter the equitable purchasers of this property?

A. I didn't know who they were at the time.

Q. Why didn't you mention your own name in this letter?

A. Well, at the time that I did it, I didn't think it was necessary—at the time I wrote that; that was the next day. I received the money next evening; Mr. Sengstacken came in after banking hours, and I sent this off the next day, and I just simply told her that I had sold it. It didn't make any particular difference, only that I had sold the land.

Q. Was it your custom in selling these properties, to state the purchaser?

Mr. ST. RAYNOR: I object as immaterial.

A. You will notice in the correspondence, some I would state the names, and some I wouldn't; depends on just how it came.

Q. What did you do with your interest?

A. I sold my interest afterwards to W. O. Christensen.

Q. Do you know the date?

A. I do not; but I think it was about a year, or a year and a half after; let's see, a year and a half, I will say, after.

Q. Did you and your brother sell together?

A. We did.

Q. What did you get for your interest?

A. I got \$600 for my interest.

Q. For your one-twenty-fourth interest?

A. One-twenty-fourth interest; by brother got a like sum.

Q. Did you ever agree with Mr. Sengstacken to take a full one-twelfth interest yourself in this property?

A. I never did.

Q. Was it always understood that you should keep the one-twenty-fourth and your brother James T. the other twenty-fourth?

A. That was the understanding.

Q. Is your endorsement on this Defendant's Exhibit CC for the purpose of correcting the certificate in that respect?

A. After Mr. Sengstacken brought that in, or sent it to me, I noticed it was made to me, and I endorsed it and showed it to Tom, and we put it in the safe; and then I think I told Sengstacken afterwards that half of that was Tom's. He says it makes no difference, you are together, and you can fix that between you, or words to that effect.

Q. You have heard the evidence in this case. There has been some question raised about the collection of this mortgage. Now what are the facts with reference to the delay in the collection of this mortgage?

A. Well, the delay was caused by reason of a man by the name of Kidder having filed a homestead on this land, or attempted to file it, and it was pending for quite a little spell before the matter was decided. That was why it was held up.

Q. Did you have any interest in this land yourself at all at the times demands were made for collection of this mortgage?

A. I did not.

Q. You had sold out prior to that time?

A. I had sold out prior to that time.

Q. Now what is the fact with reference to this \$250 being credited on the note by yourself for some defect in the title?

A. Well, there was an error in the description of 80 acres, and then there was an overlap or dispute between the East Marshfield Land Company as to a part of it, and the Kidder claim, and in order to adjust the matter, why we agreed to allow \$250 on the mortgage. I wrote to Mr. Herrmann to that effect.

Q. What was this mistake in the foreclosure proceeding?

A. There was one eighty that was misdescribed.

Q. In what?

Mr. ST. RAYNOR: I object to that as not the best evidence.

Mr. PECK: I understood that the Clerk of the County Court was subpoenaed here by the plaintiff in this case, and as we understood, he was to bring certified copies.

COURT: He may go on and explain the credit of \$250. It is only an incident in this case anyway.

Mr. ST. RAYNOR: Not for the purpose of showing defect in title.

A. An error in description. I forget just how it was described, but an error. It was misdescribed in the summons.

Q. And in the compromise between the East Marshfield Land Company—

A. East Marshfield Land Company.

Q. —and the Title Guaranty & Abstract Company, you obtained their quitclaim deed?

A. Yes.

Q. And paid them \$500; the Title Guarantee & Abstract Company paid them \$500, \$250 by yourself for Christian Herrmann, and \$250 out of the Title Guaranty & Abstract Company?

A. We allowed the Title Guaranty & Abstract Company \$250.

Q. You allowed them credit on the notes?

A. On the notes, as a compromise.

Q. And the Title Guaranty & Abstract Company paid the \$500 in cash?

A. They paid the \$500.

Q. When was this Kidder contest?

A. Well, that is—I don't remember the year. I think it was about 1906, possibly 1907; I think 1906 that he entered it; I wouldn't be positive as to the year.

Q. I hand you defendant's Exhibit Y, your let-

ter to Dora Herrmann, in which you said: "there is now considerable talk about land, and we have a good prospect of selling the Holcomb tract for \$4000," and ask you if you have any explanation to make of that statement in view of your testimony that the sale was actually made on May 17th?

A. I had not received any money other than the note that was introduced here, and I didn't wish to lead her to think that the sale was completed until I got the money in my hands. She was very peculiar. You will notice by some other letters here, when I would write telling her I was negotiating with certain persons or thought I had a sale, and it fell through for any reason, she was always writing asking why I didn't complete it, and while I considered the sale was made, yet at the same time it was subject to title and subject to examination, and I thought I would wait until I got the money before I said anything about having completed it.

Whereupon said witness, on cross-examination by solicitors for complainant, testified as follows:

Cross-examination.

Q. How long have you been the agent representing Mrs. Norman prior to the time that she left California?

A. Not at all.

Q. Not at all before that?

A. No, not before.

Q. Your relations with her commenced, as far as

representing her property interests, after she left here for San Francisco?

A. When she went to California.

Q. What year was that?

A. That was in 1898.

Q. And what year was it that she returned to Marshfield?

A. She went to California, and was gone during the winter, and came back next spring.

Q. Now, how long did she remain then in Marshfield?

A. She stayed in Marshfield about a year.

Q. And do you know at what time she left there for Germany?

A. Then she went back to California, and was in California a little while, and then went to Germany.

Q. Now, you didn't see her, did you, after she went to Germany?

A. Oh, yes. She went to Germany and was gone a year or so and came back.

Q. Now what time did she come back?

A. I think it was in 1901, but I wouldn't be positive as to the date.

Q. And how long did she remain in Marshfield then?

A. One year, hardly a year. She was in Marshfield and San Francisco together about a year.

Q. Then your recollection is that she was in Marshfield about 1902, is it?

A. No she left before 1902.

Q. Well, what I mean is, you say she returned, and remained about a year.

A. About a year. That was in 1901, I think it was she returned 1900 or 1901. Then she went away. She was in Germany in 1902, and she never returned after that. But I couldn't say just—I probably might, referring to my books.

Q. I suppose, as a matter of fact, you might be mistaken on the date?

A. As to the date, I wouldn't be positive without looking at my records. I don't know whether this book I have here would give a full record or not. I might be able to refer to that.

Q. When does your record show that you first commenced corresponding with her? What was the first letter, do you know?

A. Well, the first letters—I had corresponded with her from 1898.

Q. I mean after she left and went to Germany.

A. Well, I haven't got my books here, my press copy book, but I think possibly I may be—I will see if my ledger here shows. It may give the dates. January—1901 that is as far as this book goes back.

Q. Is that when you commenced in that book?

A. That is where I commenced in this book.

Q. What is that letter to—what place?

A. That isn't a letter. This is simply an entry in the book, where I received money for her.

Q. And that must have been after she left, was it?

A. That was after she left.

Q. What date in 1901 was that?

A. This book here I have "Forward \$116.75 January 1, 1901," so it must have been she must have left then; I would infer from that about October something, in 1900; I would infer from this book.

Q. Where was that letter sent to?

A. This is not a letter. I don't know. It is simply an entry in the book. I haven't got my letter book.

Q. It indicates to you, however, she had left before that?

A. Yes, she had evidently left. I see where I sent her checks. I sent her a check in April of that year.

Q. Sent her a check?

A. Yes.

Q. Can you tell where the check was sent to?

A. The check was sent to a man by the name of Walters in San Francisco.

Q. For her?

A. For her. You see, when she first went away, she had me send the money to Walters, and then Walters would forward it to her.

Q. In Germany?

A. In Germany. And later he wrote me—she wrote me, rather, to send the money direct, for the reason, she said, it delayed the matter, and always cost her extra to have to send it that way. I see her check was sent to Walters. That is April 12, 1901. I sent him a check.

Q. Now, after that time that you refer to there, she didn't return to Marshfield, did she, at any time?

A. I don't think so.

Q. As a matter of fact, that was just on the edge of the hard times of the nineties, was it not, when real estate values had all practically dropped off?

A. No that was 1890; just about that time real estate was on the rise.

Q. In 1890?

A. I mean 1900. This is 1901. It is the time that Kinney came in there and was going to build railroads all over the country, and people kind of got excited, and real estate went up.

Q. Up to 1900, before Kinney came in there, was there any sale for real property?

A. No sale for real property at all, scarcely: outside of timber that was handy, or good farming land, you couldn't sell it for anything.

Q. Now was Mrs. Herrmann in regard to—was she an illiterate woman, or an educated woman?

A. She was illiterate. She could read and write.

Q. She could read and write?

A. She could read and write but she couldn't write English very well. She could sign her name, and her signature sometimes was very legible, and sometimes nervous, and we could hardly read it.

Q. She was a German woman?

A. She was German, yes.

Q. How old was she when she left here?

A. 65 years old. 65, I think it was.

Q. Now, in regard to her land that is in question here, did you advertise anywhere?

A. We have had an advertisement in the papers, carried one in the papers all the time. Have for years.

Q. Did you advertise it in any newspaper?

A. I say, we have had an advertisement in the paper continuously for a number of years, sometimes we would put in the description of the land, sometimes just real estate for sale.

Q. What time did you have this land in particular advertised in the Marshfield papers?

A. Well, I don't know as we had it described, but we have had a standing advertisement in the Coos Bay News; let's see, my brother came in with me in 1899, and it has been there ever since. As I say, sometimes it would describe the lands; other times just simply an advertisement.

Q. Now did you have a description of this Norman tract in any Marshfield paper during the year 1904 or the year 1905?

A. Well, I couldn't say whether we had this Norman tract or not. It may have been. I wouldn't like to say.

Q. You have no recollection?

A. I have no recollection of it, for the reason my brother looked after that part of the business, and I paid but very little attention to it.

Q. Now did you, at any time, in any of your letters to Mrs. Herrmann, ever tell her that you had sold this land to Sengstacken, or to Mr. Smith?

A. No. You see the letters, all I wrote her are here in evidence.

Q. And you never told her at any time that you had entered into a contract with Mr. Sengstacken and Mr. Smith on the 17th of May, 1905, or at any other time, did you?

A. Not on the 17th of May; in the latter part of August I wrote her I thought it was sold; that the boys came through with the money, and that the deal would be closed September 1st. I think you will find that in a letter.

Q. Which letter was that, Judge?

A. That was the letter of August 12th.

Q. And that was the only indication you gave her at any time, was it, that you were going to sell the land?

A. That is the letter. You have all the letters right there. It tells what I done.

Q. Now, you didn't in that letter tell her that you had sold the land, did you?

A. In that letter I told her that I thought I had the land sold for \$4,000, and it was all right if the party came through with the money, raised the money.

Q. Now, why did you not write her that you had entered into a contract for the sale of the land?

A. Well, I don't know. I didn't think it was necessary. That is one reason. And another reason was that if I had wrote her, as I did, you will notice, on two or three other occasions, telling her I was dealing

with certain individuals for property, and it fell through, why, she would be writing back; the old lady would be worrying about it. She worried a great deal about it.

Q. Now, she wrote you in several letters, did she not, in 1904 and the spring of 1905, and even later, asking you to send her exact details of the condition of her property and of sales?

A. She wrote me several letters.

Q. Several letters asking exact information?

A. Exact information as to her money.

Q. Why, when she wrote that, did you not tell her that you had sold this land to Mr. Sengstacken and Smith?

A. I wrote her, and answered her letters. She wanted exact details as to titles; if you look at the letters, you will find that and the condition, and if I had it so it could be sold, or words to that effect, and to hurry up and sell the property as she wanted the money.

Q. Now you say on the 30th of August, 1905, that you executed this deed?

A. I think it was the 30th.

Q. As the attorney in fact for Mr. and Mrs. Herrmann, to the Title Guaranty and Abstract Company?

A. Yes.

Q. And then the next day you sent a letter to Mrs. Herrmann?

A. I did.

Q. Now, why did you not in that letter tell her

that you had sold this property to Mr. Sengstacken and Smith?

A. I wrote her that I had sold the property and had taken a mortgage for half. I didn't state to whom it was. That was just kind of—sometimes I would write and tell just who it was, and sometimes I didn't. Same as I do with any one else. First she was interested in knowing if the property was sold, and what I got for it.

Q. But you never at any time told her, did you, in any letter, or Mr. Herrmann, that you had sold this property to Sengstacken and Smith?

A. I didn't write to her, but Mr. Herrmann, I sent him shortly after she died, when he wrote me and wanted to know the condition, I sent him a copy of the mortgage and note, and a copy of the inventory in the estate.

Q. You say a copy of the mortgage?

A. A copy of the mortgage and note.

Q. Have you any letter, Judge, that shows that you sent him a copy of the mortgage?

A. I think it refers to it there in one of the letters there. If I had known that he expected that, I would have had it here, but you have a letter there where he speaks of the mortgage. I sent him a copy of the mortgage at that time.

COURT: The letter of February 19, 1906, has some reference to it.

Mr. ST. RAYNOR: It has a reference to it. That is that note—that is embodied in that \$2200 note.

A. I sent him a copy of the note and mortgage at that time, and a description—he wanted a copy of all of his deeds. I didn't have his deeds. I sent him a copy of this mortgage, and note and a description of all the lands.

Q. You never sent him a copy of any contract, did you, for the sale of this property?

A. Why, this property was sold before the old lady died. And the money he got; the money was sent before she died.

Q. Yes, but you became aware, did you Judge, that after you received the reply to your letter of August 31, 1905, that Mrs. Herrmann had died about the time of the receipt of that letter, did you not?

A. Well, I inferred from his letter that she had received it before, as he said that she wasn't able to write to answer my letter, but as I understand him, he says she got it the day before she died.

Q. After that you held your correspondence with him?

A. With him, yes.

Q. Why didn't you send him copies of all the papers as he requested you to?

A. I did. I sent him a copy of the mortgage and note.

Q. After the death of Mrs. Herrmann?

A. After her death, when he wrote and wanted a copy of those things, I sent him a copy of the mortgage and note, and a description of the land that he owned.

Q. Why did you not bring that copy book, Judge, containing all of those copies of letters. A request was made on you and your attorneys, was it not? A notice served on you to produce all of these papers?

A. Mr. Peck called me up on the telephone a couple of days before I went away—that is a brother of the Mr. Peck here—and said that they wanted all the letters and correspondence had in connection with this case, with this transaction, and I brought every one of them.

Q. Well, wasn't that some of the correspondence in connection with this case between you and Mr. Herrmann?

A. I don't think so.

Q. You don't?

A. No.

Q. That notice requested you to bring copies of all letters, did it not?

A. I never seen the notice. All I know is, Mr. Peck said he wanted copies of all letters and correspondence concerning this case, and I went back, clear back to 1902, and got the correspondence, and brought it up until after she died, and one or two letters even after. There is one or two letters here that I wrote him.

Q. From all of these letters that you wrote, to both Mrs. Herrmann and Mr. Herrmann, you never at any time made any statement or intimated that you had sold this property to Messrs. Sengstacken and Smith?

A. I didn't state to whom I had sold it.

Q. And you didn't at any time, to either Mrs. or Mr. Herrmann, state to them that you and your brother or either of you, had an interest in that property, did you?

A. I didn't have an interest in that property at any time when I wrote to Mrs. Herrmann.

Q. Or to Mr. Herrmann?

A. After I wrote him yes.

Q. How?

A. When I wrote him I had an interest.

Q. But I asked you, did you at any time ever write and inform him that either you or your brother had an interest in that property that you acquired on the 30th of August, 1905, or any other time?

A. I did not.

Q. And you never informed him, by word of mouth or otherwise, that you had, did you?

A. No, sir. I got his letter after her death, stating that he had received the check, and that he was satisfied.

Q. I will put in your hand, Judge, a notice, and I will ask you, do you know whose signature that is?

A. That looks like Mr. Peck's, Cassius R. Peck.

Q. Did you ever see that notice?

A. I never did.

Q. Mr. ST. RAYNOR: It was served on you, was it not, Mr. Peck?

Mr. PECK: Yes.

Mr. ST. RAYNOR: We will offer it in evidence.

It is the notice to produce all of these papers.

Marked "Plaintiff's Exhibit 29."

Q. What time was it that you say Mrs. Herrmann had sold this property to Mr. Sengstacken?

A. That must have been about 1902 or '03. It was just a little while before they commenced this proceeding on the second foreclosure.

Q. And that was the time that you say you had received information to sell it for \$3,000?

A. When she left here, she left it with me to sell for \$3,000. When she went to California she left it with a lot of other property, listed it at \$2,000. When she got back, she thought I ought to have sold it. I told her I had been unable to get anybody interested. I said to her, I said, the property is worth \$3,000. "If you can get anybody to give \$2,000, you can sell it for \$3,000." At my request she raised from \$2,000 to \$3,000. That was the figure she had on the property when she went to Germany, \$3,000.

Q. Then you put it up to Mr. Sengstacken, and he told you did he, that he could get it for less?

A. No. The old lady would change her prices. She was very peculiar about that, and I never made a sale without consulting her, and when Mr. Sengstacken came to me wanting to buy it, and he either wrote or wired to her, and she made a deal with him direct. I had nothing to do with that deal.

Q. Well, what was it you said that Mr. Sengstacken agreed to purchase it for from her?

A. I don't know what the price was. I understood

from him that it was \$3500. I think, either \$3000 or \$3500 but I never had a correspondence with her about it.

Q. You said he told you he could do better?

A. Do better with her, and did.

Q. What did you offer it then to him for?

A. I think I was offering it for \$4,000.

Q. Do you know what became of that deal between him and her?

A. When they went to examine the title, the attorney turned it down, for the reason he said she didn't have a good title.

Q. How much was it you say you paid for your interest in the property?

A. Well, I got a one-twenty-fourth interest in the property and it would be $1/24$ of \$2200. I haven't figured it out.

Q. And did you pay that in actual money?

A. No.

Q. How?

A. In settling with her, as she owed me \$150 and then the commission on that, I simply turned that commission; we got some money out of the money that was turned in. Of course, we accounted to her as though it was all money received.

Q. You say that Mr. Clinkinbeard gave you a sum of money on the 30th of August?

A. He paid me a check, I believe it was, yes.

Q. \$366 and some cents?

A. \$366.65 I think it was.

Q. And Mr. Rogers also paid you that same amount?

A. Same amount, yes, sir.

Q. And how much did Mr. Sengstacken pay you in money?

A. Well, I have given him—well, his was checks and money, it amounted to—I gave him credit for the full amount; \$1466.70 is what he is credited for that date. Of course he didn't pay me quite that much. There was an amount I took afterwards was held out. It lacked that much of being—

Q. That is, you held out the amount that was to go for you share?

A. One-twelfth of \$2200. He wanted to know if I would take an interest. He said one of his men had fallen down, and I said I would let him know the next day. I would have to consult with my brother about it.

Q. And you deducted the $1\frac{1}{12}$ of the \$2200 from the fourteen hundred?

A. I gave him credit for the full amount, and of course he lacked that much of paying me the full sum.

Q. Now, at that time you had an agreement with him, did you, that you were to receive a certificate for your share of $1\frac{1}{12}$ did you not?

A. I did not.

Q. In the property?

A. I did not. I had no agreement with him at all.

Q. Well you were paying your money, or surren-

dering your money or credit at that time for a $1\frac{1}{12}$ share in the property, were you not?

A. I didn't care to take the share at that time, but I gave over. We closed the deal. If I didn't take it, Sengstacken would have to dig up the money to me; if I took it, of course that was a credit.

Q. Your money went, did it not, for the purpose of you receiving the $1\frac{1}{12}$ interest in the real property?

A. My money? It was that much share.

Q. Well, but you surrendered what you had coming in consideration of receiving $1\frac{1}{12}$ interest in the real property, did you not?

A. On August 12th, I gave Mrs. Norman credit for the full sum that was coming, and I took Sengstacken for the shortage, what he lacked of paying this \$2200.

Q. On August 12th?

A. August 30th.

Q. What I mean Judge, you don't understand evidently, what I mean, Judge, this money of yours that you gave Sengstacken credit for was the consideration that moved from you, whereby you were to receive a $1\frac{1}{12}$ undivided interest in that property, was it not?

A. That consideration—the shortage was the consideration, yes.

Q. For that $1\frac{1}{12}$ undivided share in this real property?

A. Yes.

Q. And then subsequently Mr. Sengstacken delivered to you this certificate for your share that you have introduced in evidence?

A. On the next day, when Mr. Sengstacken came in. I had had a talk with my brother about it, and we concluded that we would take that share. And then, subsequently—

Q. Subsequently Mr. Sengstacken delivered to you that certificate of the Title Guaranty & Abstract Company?

A. Yes. I think that was October 2nd, afterwards.

Q. Then you wrote the assignment on the back to your brother?

A. Yes.

Q. Of one-half of that one-twelfth?

A. Yes.

Q. Now, at the time that you were making this arrangement, and the time Clinkinbeard was there paying his money, who was there besides Clinkinbeard and you?

A. Well, Clinkinbeard was in there, Mr. Rogers was there. My stenographer in the office was there, and I don't know who else. There might have been other people there—people come and go.

Q. Was Mr. Sengstacken there at the same time?

A. Mr. Sengstacken was not there?

Q. To whom did you deliver the deed?

A. Mr. Sengstacken.

Q. And who delivered the mortgage?

A. Mr. Sengstacken.

Q. For the \$2200.

A. Mr. Sengstacken.

Q. And were the mortgage and the deed delivered the same time?

A. They were.

Q. You delivered the deed to Mr. Sengstacken, and he delivered the mortgage to you?

A. I think that was it.

Q. Did he deliver the note with the mortgage to you at the same time?

A. The note was delivered with the mortgage.

Q. Then you placed the mortgage of record did you?

A. I did. I had it done.

Q. Have you made a search for the purpose of finding this receipt which you testified to?

A. I looked through the papers and I have been unable to find it. I have no recollection of it ever being returned to me.

Q. Is it insisted by Mr. Sengstacken that he returned it to you?

A. He doesn't remember whether he did or not.

Q. You say you have searched your papers and have been unable to find it?

A. Have been unable to find it.

Q. Now this sum of money that you gave as consideration for this 1|12 interest in this land, that was for an undivided 1|12 in all of the land that is described in that deed, including all of the rights, benefits, easements and appurtenances in Lot 3 as de-

scribed in the deed was it?

A. All the property described in that deed. I had 1|24 and my brother 1|24.

Q. And your brother 1|24?

A. Yes.

Q. Now how many acres are there in Lot No. 3?

A. I couldn't tell, might tell by looking on that map. I think there is in the neighborhood of 280 acres all together, close to that. According to this map there is 31.50 acres in Lot 3.

Q. Are there not 280 acres described in that deed exclusive of that Lot 3, Judge?

A. Well, this Lot 3 wasn't sold. It was only a right to—

Q. I know, I am not asking you that, Judge. Are there not 280 acres of land, independently of the rights in Lot 3?

A. There is something like that, yes.

Q. What?

A. There is something like that. Lot 2 is 38.35; would be about 278.35, would be about what would be in the tract.

Q. And in addition to that are these rights in Lot 3?

A. These rights in Lot 3.

Q. Now, one of these witnesses, Judge, referred to Mr. Beale. Is that the same Mr. Beale who obtained an assignment and operated on this timber tract that was under litigation regarding the timber, between Bradbury and Pierce and Mr. Herrmann?

A. I think it was. There are two of the Beale boys, but I think this was George W. Beale.

Q. He is the one that had removed, under that assignment from Bradbury & Pierce, that timber in question?

A. Yes, that is the Beale.

Q. Who was this man that you say filed a homestead claim on this property, Judge?

A. His name was Kidder. I don't remember his initials, but Kidder.

Q. And what was the nature of his claim there?

A. He filed a homestead, or attempted to file a homestead.

Q. You didn't consider that of any moment did you?

A. Well, there was some question about it. He claimed to have found some defects in the records at the land office, and was going to hold it as a homestead.

Q. And how long was that after the deed and mortgage was executed?

A. I couldn't say how long. I think it was in the neighborhood of a year, though it might have been a little more or less. I don't remember just how long it was.

Q. When this transaction was had between you and Mr. Sengstacken and these other parties on the 30th of August, 1905, you never took into consideration any defect of title did you, in regard to that?

A. No no. I didn't know anything about that.

Mr. PECK: We are not claiming anything on that account. We are not claiming any depreciation of value of the property at that time on account of defect in title. We examined the title, and thought that the title was good at the time.

Q. You didn't consider the property was depreciated in value by reason of any defect in the title at that time, did you, Judge?

A. No, I didn't.

Q. Do you know who purchased Mr. Clinkinbeard's interest?

A. I do not. I was told Mr. Sengstacken had purchased it but I don't know.

Q. You said, I believe, that Mr. Sengstacken had purchased an interest—I mean Christensen had purchased an interest.

A. W. O. Christiansen purchased the interest of myself and my brother.

Q. What time was that?

A. Well it was something about a year; it might have been a little more or less after the sale.

Q. Does your ledger show that?

A. No.

Q. Any of your books?

A. I don't think I have any books here that would show it, I may have Mr. Christiansen's account here. I will look and see. It may be there, but I don't know. It was between 1905 and 1907. I will see if I can find it. (Looking up records.) I haven't got anything that gives me any data as to the particular date.

I will say it was between, it was before 1907. I got it right here, November 27, 1906.

Q. That is the time that you sold your interest and your brother's?

A. That is the time that he made the payment to me.

Q. Christiansen?

A. Yes.

Q. And how much did he pay you then?

A. He paid us \$700 at that time.

Q. \$700 each?

A. No, \$700 between us at that time.

Q. Well, how much did he pay you in all, for your brother's and your interest?

A. \$1200.

Q. And you had paid \$600 for it, had you, about?

A. About that, yes.

Q. Now did you handle the deal by which Christensen sold his interest that he had acquired from you and your brother to Sengstacken?

A. No, sir.

Q. You don't know anything about that?

A. Don't know anything about that.

Q. Now, you say that the reason that you took this 1/12 interest at that time was to keep the deal from falling through?

A. No, I don't say that. I said that it probably would delay matters.

Q. Delay matters?

A. Yes.

Q. Well what was it that Sengstacken told you about the deal falling through?

A. He said one of his men had went back on the deal, or went back on him or words to that effect.

Q. And these gentlemen that were engaged in this deal at that time were men that were worth considerable money were they not?

A. All of them.

Q. And Mr. Sengstacken was a man of considerable wealth, then, was he not?

A. Yes.

Q. And Mr. Smith?

A. Smith, yes.

Q. And Clinkinbeard?

A. Clinkinbeard.

Q. Mr. Rogers?

A. Rogers.

Q. And Mr. Rood?

A. Rood.

Q. All men of wealth?

A. Well Rood wasn't a man of a great deal of wealth.

Q. Now how much was this interest that you say Herbert Rogers was to take—what was it to cost him?

A. It would be $1\frac{1}{12}$ of the amount.

Q. $1\frac{1}{12}$ of what amount?

A. The amount to be paid at that time, \$2200.

Q. So it would have been less than \$200 would it not?

A. Something like \$183 I think.

Q. Now, you wouldn't consider, Judge, would you, that it would be a matter of any great difficulty for Mr. Sengstacken or either of these other gentlemen to have furnished that one hundred and eighty odd dollars to have prevented the deal from falling through, do you?

A. Well, Mr. Sengstacken, I guess, could have raised it. That is, if it came to a pinch, I could have let him have the money; take him for it; give him credit. I figured if my brother wouldn't take it, I would take him for it rather than have it delayed. The other parties wouldn't put up any more, for I guess he worked on them pretty hard to get them to go into the deal with him.

Q. Did he tell you that?

A. He didn't tell me, no. Some of them has told me since, though—Mr. Clinkinbeard has told me so, so has Mr. Rood.

Q. But you didn't seriously consider the deal would fall through on account of a lack of \$183?

A. Didn't think it would fall through, but thought it might delay matters, and the old lady was wanting money, and I was trying to hurry the money there to her.

Q. Do you know, of your knowledge, Judge, who owns now—

A. I do not.

Q. —All of this property?

A. I do not.

Q. Do you know who the parties are?

A. I know some of them. I know Mr. Siglin owns an interest in it there now, and Mr. Sengstacken and Smith. But whether any others in there or not I don't know.

Q. Mr. Sengstacken is the principal owner is he not?

A. As far as I know.

Q. And the next one is Mr. Smith in interest?

A. I hardly think it, I think possibly Mr. Siglin has as much as Smith, but I don't know. I don't know what interest either one of them has.

Q. Have you had any interest in the property, Judge, since you sold out to Christiansen?

A. None at all.

Q. Or your brother?

A. None at all.

Q. Did you examine to ascertain whether or not at the time that Mr. Sengstacken gave you the deed that the proper authorization was made by the Company to execute the deed?

A. No.

Q. You didn't examine that?

A. No, sir.

Q. How?

A. No, sir. I never seen any of the papers of the Company.

Q. All of your transactions in regard to this deal respecting that deed and the mortgage from the Title Guaranty and Abstract Company was through Mr.

Sengstacken was it?

A. Through Mr. Sengstacken, yes, and when the deal was first made, the deed was supposed to be made to Sengstacken and Smith. Later—

Q. Well I mean—

Mr. PECK: Let the the witness finish his answer.

A. Later on, Mr. Sengstacken told me he was trying to get a syndicate to take it up.

Q. That is not what I asked. What I want to know is, the transaction of the delivery of these papers, the mortgage and deed, you had with Mr. Sengstacken?

A. Mr. Sengstacken, yes.

Q. And you said the deed and mortgage were exchanged at the same time?

A. Same time, yes.

Whereupon said witness further testified on redirect examination, as follows:

Redirect Examination.

Q. In your cross examination, you said that you had obtained your interest in the property for $1\frac{1}{24}$ of \$2200. Did you mean $1\frac{1}{24}$ of \$2200, or did you mean a cash payment of $1\frac{1}{24}$ of \$2200, with an obligation to pay $1\frac{1}{24}$ of the remaining \$2200?

A. Cash for $1\frac{1}{24}$. The other for the mortgage. I figured $1\frac{1}{24}$ of the purchase price.

Q. $1\frac{1}{24}$ th?

A. My part was $1\frac{1}{24}$ th, and my brother $1\frac{1}{24}$ th of the purchase price.

(Testimony of George N. Ferren, for Defendants.)

Whereupon defendants to support the issues in their behalf, called as a witness George N. Ferren, who being first duly sworn, testified in substance as follows:

Direct Examination.

That he resides in Portland; that he is an attorney-at-law; that he lived in Coos Bay about ten years prior to a year ago last March; that he was acquainted with C. J. Bruschke; that the reputation of C. J. Bruschke for truth and veracity in the community in which he lived was bad.

Whereupon said witness on cross-examination by solicitor for complainant, testified in substance as follows:

That he never had any business relations with C. J. Bruschke; that he was associated in law practice with his brother E. L. C. Ferren; that he is not sure as to whether or not his brother had any cases in which Bruschke was connected; that he has heard Bruschke's reputation discussed on numerous occasions but not in connection with any cases that he remembers; that he knows Henry Sengstacken and is friendly with him; that he knows John F. Hall and is friendly with him, and also James T. Hall and L. D. Smith, and has been friendly with them for a long time; that he has known defendants John F. Hall and Henry Sengstacken ever since he can remember anybody; that he never had any personal relations

with C. J. Bruschke; that his recollection is that Bruschke was considered more as a joke—a dreamer, but he does not know anything about his real estate transactions; that he didn't know Bruschke very well except by reputation; knew him in Berkeley, California, before Bruschke came to Coos Bay, and that at that time Bruschke was engaged in promoting some land proposition in connection with Mr. Corbin of the Continental Loan & Trust Company of San Francisco; that he never had any dealings with Bruschke in any way; that he has had some dealings with Henry Sengstacken but not any with Smith and John F. Hall except to be associated either with or against them in the trial of a lawsuit; that all he knows about Bruschke's reputation for truth and veracity is that he has heard several people discuss it, among them George Beale, Anson Otis Rogers and Bradbury; that he does not recall anybody else, and these parties did not state any particular circumstances; that Bradbury told him this about Bruschke at least five years ago.

(Testimony of L. C. Ferren, for Defendants.)

Whereupon defendants to support the issues in their behalf, called E. L. C. Ferren, who being first duly sworn testified in substance as follows:

Direct Examination.

That he is thirty-four years of age; that he was an attorney-at-law in Coos Bay for about eleven years prior to about a year ago; that he is now living in

Portland, Oregon; that he knew C. J. Brusckke; that Brusckke's reputation for truth and veracity in the community in which he lives is bad.

Whereupon said witness on cross-examination by solicitor for complainant, testified as follows:

Cross-examination.

That he has known Henry Sengstacken about twenty-five or thirty years but is not especially friendly with him; that Sengstacken sold one or two pieces of property for him at different times; that he has known John F. Hall for about twenty-five or thirty years; that he has represented C. J. Brusckke in a lawsuit and has also been interested with him in a lime deposit; that he represented Brusckke at one time as attorney in a slander suit; that as far as he knows Brusckke is a man that pays his debts, never heard of him cheating anybody; that Brusckke was always perfectly honorable with him in all of his business transactions and that he never gave any indication of being dishonest or trying to beat him in any way; that Brusckke was rather fanciful in his ideas—was a man that has peculiarities.

(Testimony of defendant L. D. Smith, for defendants.)

Whereupon defendants to support the issues in their behalf, called L. D. Smith, one of the defendants, who being first duly sworn, testified as follows:

Direct Examination.

Q. State your age, residence and occupation?

A. Age 57; residence Coos River, Coos County, Oregon.

Q. Occupation?

A. Farmer.

Q. You live on a ranch?

A. Yes, sir.

Q. On Coos River?

A. Yes, sir.

Q. Now state in your own way the circumstances and facts concerning the initiation and consummation of this deal, as you had to do with it?

A. Well, as far as—I had to do with it, I had very little. I had bought—had been buying on and off since 1898 or '99, more or less property around the bay, and I think in most every case I bought in partnership with Mr. Sengstacken and consequently when I had any—wanted any advice, or talked buy, you know, of any particular piece, I always talked with Mr. Sengstacken. In fact, he did my business. I don't have any—if I wanted a paper acknowledged, a deed or anything, I always went to his office, and this time I was in town, we were talking over different buys. There were several different pieces on the market, and this piece among the rest and either he or I mentioned that probably that would be a good buy to take it up and hold it. I thought, and I expect he did—I know I thought that it wouldn't be long until that property would be worth more money, a whole lot more money, I thought, in my estimation, and we bought it. That is we agreed to go over. Now, I

had never talked with Mr. Hall about the price. I got that from Mr. Sengstacken. I never had but very little business with Judge Hall as an attorney, but Mr. Sengstacken told me that day that that piece could be bought for \$4,000. I wasn't right well acquainted with the piece, but I went across the bay and looked at it as well as I could, and got a man over there to show me the line between that and East Marshfield. I came back then and told Henry I thought we better buy it at \$4,000, and he didn't—we didn't care to buy it that day. I don't think we did that day, because I was in there several times talking about it. But a few days afterwards, might be the next time I came down, or the next, we talked it over; we did agree to go and buy it and I went over; I don't know whether he went before I did or not, but we both went together to make this payment. I think Mr. Sengstacken had been over before and made the arrangements with Mr. Hall, what we should do, but we went over and gave him this note; we went over and told him we would take the land.

'Q. I hand you Defendants' Exhibit BB, and ask you if that is the note that you gave at that time?

A. Well, it must be. The signature is gone, but that is undoubtedly the note.

Q. Did any other papers pass between you and Mr. Hall, or Mr. Sengstacken and Mr. Hall, at that time?

A. Well, I wouldn't know as to that, because I—as far as attending to the business, the legal part of it,

I paid no attention to that whatever. That has been a long time ago, and I just presume of course, that Mr. Sengstacken took the proper papers, and that Mr. Hall, being a lawyer too—I didn't pay any attention to that part of it.

Q. Well, then, what more do you know about the deal? What did you and Mr. Sengstacken do next?

A. Well, it was hung up for awhile. I was scratching around; well,, then, we concluded to take in these partners. That was the next act I did, was to go around to get people to help us. I think we talked that over, too, before we bought it. I don't get this thing just as it was, we had talked it over before that we wouldn't take this all ourselves, but we would get others to go in, and would let them in on what we called the ground floor, as we bought it; wouldn't try to make anything out of it, but we would buy it and let these fellows come in and take part of it. And we talked over to take in good men, men we could get along with; men that were able to take it, and so on. And he was not to solicit anyone to come in unless I was satisfied, and I was not unless he was, and so on. And after we had bought the land, then I started around and named over a few men to Mr. Sengstacken, if he would be satisfied, my nearest neighbors. He said they were all right. Then he named over some around Marshfield. Mr. Siglin, Mr. Bennett, I think, anyway, Ralph Williams, and quite a bunch around there. I was satisfied anyway I put this up to a good many men. Mr. Rogers and

Mr. Clinkinbeard were two of the men I asked to come in it. And they came in. I think they were the only two that I asked to come into the deal that did come in.

Q. How much trouble did you have, or what effort did you make, in attempting to get persons to go into the transaction at that time?

A. Well, I went to Mr. Clinkinbeard first, my nearest neighbor first, and he says "I want to talk with Mr. Rogers first" and he did talk with Mr. Rogers on the boat going down. Rogers runs the boat that runs down the river; Clinkinbeard and I talked on the boat going down, and he talked to Mr. Rogers. Then we all three talked together. I put it to Mr. Rogers, too. And they both said if things were as we represented, as I said it was, that they would take this $1\frac{1}{12}$ interest each. After we got to Marshfield, Mr. Clinkinbeard and I, at Mr. Rogers' suggestions, went over and took another look at the land, and then came back—I think that, though, was—as to the time between when I talked with them, and when we did go over to look at the land, I can't remember that. I haven't much idea, but it was some weeks or days before we finally put our money in and got the deed. At any rate, Clinkinbeard and I went over there and I showed him where the man had shown me the lines; in fact, we ran across another man over there, Mr. Buckman, that lived there, that knew where the line was between that and East Marshfield; in fact, all the land. But we didn't go

clear around it; we were satisfied with it; he was satisfied, and came back and reported so to Rogers; he thought it was all right; it was safe to buy it as a proposition to hold awhile. And they did buy it.

Q. Well who was it—did you solicit any person who refused to go in?

A. Oh yes, quite a number. Quite a number that refused.

Q. Can you name them?

A. I can name a good many of them, Ralph Williams, Flanigan & Bennett's Bank, J. W. Flanigan, Z. T. Siglin, John Yoakum, George Flanigan, J. A. Matson. That is all that I remember.

Q. Did you solicit George Beale?

A. Yes, George Beale, yes, he is one of my nearest neighbors. He was one of the first that I put it up to. Clinkinbeard first, Rogers and Beale next, my three nearest neighbors.

Q. These parties that you last named turned the proposition down?

A. Yes, sir.

Q. Why?

A. Most of them didn't think it was a good buy, was the excuse that they gave to me; might have had other reasons, but that is what they all gave to me. Some of my best friends told me I better put my money somewhere else, tried to discourage me. I remember old Ralph Williams gave me quite a talk about it. I told him it was too late now. It was already done.

Q. On the day that you paid in your money, where did you pay it in?

A. I paid mine into the Title Guaranty and Abstract Company's office, to Mr. Sengstacken.

Q. Did you go to John Hall's office at all that day?

A. No, sir.

Q. When did you first learn that John Hall, or the firm of Hall & Hall, had taken any interest in the property?

A. The very next time that I came to town. I know Rogers, Clinkinbeard and myself all paid in our money and closed this deal on this day, the 30th of August, I believe. I wouldn't 'be positive as to the date, but it was the day that Rogers and Clinkinbeard paid their money, for some reason they went up to Mr. Hall's office. I thought we were all going to the Abstract Company's office. That is where I thought we were going, as the deed was to be left,—we all agreed about the deed now, that that should be put in trust with some one. We thought that it wouldn't be best for us all to be joined in one deed; for it to be deeded to all of us; it would be better to handle, and easier to deed it to some one in trust. So we were all satisfied to put it in the Title Guaranty & Abstract Company in trust for all of us. And I went there along with Mr.—there I met Mr. Rood, and we paid our money there.

Q. Well, my question was, how soon after that time did you learn that Hall & Hall, or John Hall,

had taken an interest in the property.

A. The next time I came to town Mr. Sengstacken told me. He says, "By the way, Mr. Rogers fell down right at the last minute—Herbert Rogers." He was one that Mr. Sengstacken had solicited to go in, and he say, right at the last minute he fell down, he says "And I got," he says "Johnnie Hall or Hall & Hall, to take his interest."

Q. At that time you paid your money in, or at any time before that time, did you have any idea, or suspicion that John Hall, his brother, or Hall & Hall, was to take or acquire any interest in this property?

A. Of course not. It was never talked of, although we all met, and I didn't think of anybody else. Rogers was to take that—Herbert Rogers was to take that interest, agreed to take it.

Q. What was the amount of your interest?

A. My interest?

Q. How many twelfths?

A. 3|12.

Q. Do you still retain that interest?

A. Yes, sir.

Q. Have you acquired any additional interest?

A. Yes, sir.

Q. In the property?

A. Yes, sir.

Q. Who from and when?

A. I acquired the interest of J. J. Clinkinbeard.

Q. When?

A. Well I have his certificate that he gave me.

Q. Will you produce that?

A. No, I haven't either (after searching).

Q. Is it down at the hotel?

A. Yes, in my other coat.

Q. Well, we can bring it up this afternoon. Do you remember about what time that was?

A. Well, it was something like a year after we bought it, or more. Might have been two years. I wouldn't attempt to say. It was the same day that Mr. Sengstacken bought from Rogers. We all four dealt together at the same time.

Q. Mr. Sengstacken states that his is November 26, 1906. If you will be willing to let that date stand until we produce the certificate, November 26, 1906, Mr. Sengstacken says.

A. I know the same dates. We both bought together.

Q. What did you pay for the Clinkinbeard interest?

A. I paid \$60 an acre.

Q. Do you still retain that interest?

A. Yes, sir.

Q. What shape is that interest in now?

A. Well after—I think about a year ago something like that, we thought it would be better to incorporate, and we incorporated what is known as the East Marshfield Land Company.

Q. Excuse me, East Marshfield Land Company, or East Side Land Company?

A. East Side Land Company, yes. East Side

Land Company, and we deeded our respective interests to the East Marshfield, East Side Land Company.

Q. And did you receive stock in the East Side Land Company in proportion to the interest in the land which you deeded?

A. Yes, sir, yes, sir.

Q. So you hold $5\frac{1}{12}$ of the shares of the East Side Land Company?

A. Yes, sir.

Q. In your statement before, I think that you said that Clinkinbeard and Rogers were to each take a $1\frac{1}{12}$ interest. Do you mean that, do you wish to correct that in any way?

A. What?

Q. That Clinkinbeard and Rogers were each to take a $1\frac{1}{12}$ interest?

A. A $1\frac{1}{6}$ interest. If I said $1\frac{1}{12}$ I meant $1\frac{1}{6}$.

Q. And the price, I think you said that the price agreed upon was \$4,000? Was it \$4,000 or \$4400?

A. Well now I had the impression it was \$4,000, but then I don't know. But it seems to me it was \$4000. I know we talked over it was about \$15 an acre—about \$15 an acre.

Q. You heard Mr. Brusckke testify on the stand here, with reference to—

A. I can tell what I paid by my receipt.

Q. You heard Mr. Brusckke testified on the stand here, with reference to certain conversations that you had with him, in Marshfield, at the time these deposi-

tions were taken?

A. Yes, sir.

Q. Will you state the facts and circumstances of that conversation?

A. I will be most glad to if I will be allowed to; most glad to state why I went up into his office that day, and what I said.

Q. State them.

A. When I first got acquainted with Mr. Bruschke, along about the last of 1895 or '96, and beginning of '96—he came to my house claiming to be down and out; that is, financially ruined through the treachery of other parties that had robbed him, but he said that he had found on my premises there, or my place, a lime and cement deposit; that if I would give him an option on it, he would make from anywhere from one half to a million dollars out of it, half a million to a million, perhaps more; that it was just an immense fortune for all of us concerned in it. I told him “Mr. Bruschke, I don’t think that there is anything of value on my place in the way of lime or cement.” Well, he kenew, he prospected, and took me up where he had been digging around. He had been around there two or three days before I knew he was in the neighborhood; and I took a liking to the man. I really liked him; I told him I believed his hard luck story; that I didn’t consider this land extra valuable; it spoiled my place if I sold that part of the land off it, but anyway, he made me an offer, or I did him, for a certain amount, something like from six to ten

thousand dollars. I gave him an option for a year for nothing on this land that he wanted, but when I gave him the option, my near neighbor, my nearest neighbor, Clinkinbeard; he wanted the same from him; the land adjoining it. He wanted his option too. Well Clinkinbeard and I, being old neighbors and old friends, we got together, and our wives, and talked it over. We didn't want to give Mr. Bruschke something that could be put on record for nothing; that we couldn't get off without trusting to him to take it off, for nothing. Mr. Bennett had told me before when you do that, you ought to get something; when you give a man an option, you wanted something to put of record. Well, I happened to know that; but Mr. Bruschke swore upon his honor to Mr. Clinkinbeard and I and our wives, that if we would give him that option, he would not put it on record. Well, it went on all right enough—

Mr. ST. RAYNOR: I submit that hasn't anything to do with this case.

COURT: That hasn't anything to do with this case. Counsel asked you about going to Bruschke's office.

A. Very well. During this trial, taking testimony in Marshfield, some one told me that day, while they were taking testimony, that Mr. Bruschke was going to testify in the case. Knowing his reputation on the witness stand, having heard him testify in Court, and knowing his general reputation as being a most notorious liar, and having him in my home for nine

months, I thought I could appeal to his manhood to tell the truth in this matter. I went up to his office and I said "I see you—I hear you are going to testify in this case against us. If you are going up there and tell the truth, Mr. Bruschke, you and I will just be the same as we always was, you are welcome to my home any time you want to come, but if you go up there and lie, I will impeach you." "What do you mean by impeach me?" "I will go right down town, and bring up twenty men, the finest men in town who will swear your reputation for truth is bad." He says "If you bring a man that says I owe him a cent in Marshfield, or will say I tell a lie, I will give you a thousand dollars." Well, I shot a few things into him that were none of my business whatever, things he had done, but it didn't concern me. I went downstairs and in a few minutes I felt a little sorry, showing the temper I did and talking the way I did to a man who doesn't resent anything, and I went back up and I says, "Now, I want to apologize for some of the things I said here," and I referred to something that was none of my business. But he said "Mr. Smith, I don't want to testify in this case. I won't do it unless I am subpoenaed, and I have to go." And I said, "That ain't the idea, Bruschke, I want you to go and testify. I want every man to testify in this case that knows anything about it. That is just what we want, but I want you to tell the truth." I says, "You know your failing. That is all I ask you" I says "To tell the truth." I says "I want you to testi-

fy, want every man to testify. We want this thing shown up open and aboveboard." And I walked out, that is the conversation and why I went.

Whereupon said witness on cross-examination by solicitor for complainant, testified as follows:

Cross-examination.

Q. Who was it told you Mr. Smith, that Mr. Bruschke was going to testify in this case?

A. I rather think it was Mr. Peck.

Q. Mr. Peck?

A. I think it was.

Q. And instantly you became alert did you?

A. Yes, I did.

Q. You didn't want him to testify?

A. No, I did not.

Q. And so you thought you would go down and threaten him that if he did that, you would have him impeached?

A. I told him that if he would go up there and lie I would have him impeached, and if he told the truth he was welcome in our home as he always was. We were always good friends. Mr. Bruschke and I have always been good friends for all—

Q. Did you threaten any of the other witnesses?

A. No, indeed, I did not.

Q. You didn't know what he was going to testify here?

A. Nothing, no idea.

Q. It was enough for you to know he was going

to testify in the case.

A. That was enough, plenty, plenty.

Q. I suppose if he had come up here as a witness for you, you would have thought he was all right, and he could have gone back into your home and stayed there as he had before. Is that the idea?

A. I surely wouldn't call him as a witness, where he is known in our country.

Q. That is not what I asked you Mr. Smith. Your idea was if he would come up here as a witness on your behalf, that then it would be all right with you—

A. I wouldn't allow him—

Q. —he could come back in your home as he had been accustomed to?

A. Not by a long shot, unless he told the truth.

Q. Unless he told the truth?

A. The truth.

Q. You knew nothing about what he was going to testify to?

A. No sir, I didn't not in the least.

Q. But notwithstanding that you knew nothing about what he was going to testify to, you threatened him?

A. Well if you call that a threat, I did, yes.

Q. And then, subsequently, it is a fact, as Mr. Bruschke testified, you went back and apologized to him, didn't you?

A. I apologized for what I said to him, and the way I said it to him in other matters, but not for that, for I repeated it over again to him, and made it

stronger than ever.

Q. As a matter of fact there has been considerable feeling between you and others who have been antagonizing you in that community, in regard to that property, has there not?

A. Not the least in the world.

Q. What?

A. Not the least particle.

Q. Why did you stand in any apprehension as to what Mr. Brusche might testify to?

A. Haven't I heard him testify in Court? Don't I know his reputation? Don't everybody in Coos County?

Q. Don't you know, as a matter of fact, Mr. Smith, even if the man testifies to something that is absolutely false, that it couldn't hurt you?

A. Well I don't know that.

Q. Didn't you know that Mr. Bruschke, when you were making those threats against him, if subpoenaed, would have to come?

A. Why of course I did.

Q. To testify as a witness?

A. Of course I did.

Q. You understood that?

A. I expected him to testify right there in Marshfield, that day, too.

Q. You understood he would have a perfect right to testify as to his judgment as to values if he was a competent witness, did you not?

A. Sure he did.

Q. What?

A. Sure he did.

Q. Yet notwithstanding that you knew nothing as to what he was going to testify to, you threatened him?

A. I did.

Q. Now, you say that all of your business you generally transact through Mr. Sengstacken?

A. Most of my land transactions have been through Mr. Sengstacken.

Q. And you rely implicitly on Mr. Sengstacken's judgment in regard to it, do you?

A. Not implicitly, no. I think he relies some on mine too.

Q. He relies some on yours?

A. He might. I think he has some regard for my judgment.

Q. In regard to Mr. Sengstacken, you have the most implicit confidence in his judgment, have you not, in regard to land matters?

A. Mr. Sengstacken is considered a little visionary as to land matters. We get a little booming then.

Q. As a matter of fact Mr. Sengstacken is considered one of the shrewdest buyers around Marshfield, is he not, of land?

A. I consider him so. I rather think he is.

Q. You consider him so?

A. Yes.

Q. And you never knew of him cheating himself, did you, in a transaction that he invested in?

A. Oh, I don't know anything about that. I don't know anything about that.

Q. You never knew of him getting the worst of a transaction that he entered into did you?

A. No, I don't know anything about that.

Q. No, it would be hard to find that. As a matter of fact, Mr. Smith, Mr. Sengstacken wouldn't be a man likely to go into an investment of a speculative nature unless it would in all probability prove a pretty successful venture, would he? That is your judgment of him, isn't it ?

A. Yes, that is my judgment of any man.

Q. A keen, shrewd business man isn't he?

A. I call him a keen, shrewd, businessman, yes.

Q. That is one reason why you rely yourself on him in a business transaction, isn't it?

A. That is one reason, another is, I think he is an honest, straight, conscientious business man.

Q. And he is an exceedingly close observer of market conditions, isn't he?

A. Well, I think he has went pretty high, he don't always—

Q. You know as a matter of fact, you say you looked around and concluded this would be a pretty good thing on your own judgment as well as Mr. Sengstacken's?

A. Yes, sir.

Q. And the reason was you saw things were going to take a jump there didn't you?

A. I don't know as I had anything at that time to

indicate they was going to take a jump, but I have always had great faith in the outcome of that place; lived there all my life, and bought lots of land. I have been holding twenty years expecting it to come next year. Next year, next year didn't come. I have land there now that I couldn't sell at all hardly for anything; I have a frontage.

Q. As a matter of fact you knew that the Drain road was going in then, or expected it didn't you?

A. No, no announcement of any Drain road then.

Q. No announcement at all?

A. No, sir.

Q. Didn't you know as a matter of fact they had been surveying the road from Drain into Marshfield?

A. Yes, sir.

Q. In the spring of 1905 and the winter of 1904?

A. Very likely had been surveying, I don't know about that.

Q. Don't you know they had commenced construction work?

A. No, sir.

Q. Somewhere in the vicinity of Drain in 1905?

A. No, sir.

Q. Don't you know anything about that?

A. No, nor no one else.

Q. What time was that banquet held in North Bend?

A. I didn't attend it; that was the first ever I heard of that banquet, that I remember of—here in Court.

Q. Now after you say you bought your interest in this property, was there any increase in real estate values there at that time, for a year or two?

A. Yes, sir.

Q. When did the increase commence?

A. Well, it seems to me that after we had had that property about a year that we could have sold it for quite a bit more than we gave for it, if we could have sold it; that is, if we could give title to it. I think it was about a year after we bought it, about the time that Mr.—

Q. Was it less than a year?

A. About the time that Mr. Sengstacken and I bought these other gentlemen out.

Q. That is when real estate commenced to take a little upward turn, is it?

A. If I remember right, it seems to me that is about right, yes.

Q. Was that the cause of it?

A. What?

Q. This railroad coming in?

A. Well I don't know as to that. I don't know as to that.

Q. What was the cause of it Mr. Smith?

A. Oh, there were several reasons that I think caused it. The big pay roll of the C. A. Smith people I think would surely have an effect, a tendency to raise values, and better times; bring more money into the country.

Q. You think the Smith mill was the cause?

A. No, I don't say it was the cause; I say I think that had a—stimulated business in general, and prices; the coming of the Smith people and mill.

Q. They didn't buy in until July, 1906?

A. Well, I didn't buy these other people out until 1906.

COURT: 27th of November, 1906, when he bought these other people out.

A. I had other reasons for buying them out, then just because we wanted the land.

Q. In the purchase of this land from Mr. Hall, you say that Sengstacken represented you in the negotiations with Mr. Hall?

A. Oh, no, not negotiations with Hall; we both went together at that time, or both went up and bought the land, the two of us. He understood, I think Mr. Hall understood it, I did. Mr. Sengstacken and I both understood that we were both buying it. We joined in the note and receipt, or whatever was given; if there was anything given us, it was given to Sengstacken and Smith.

Q. Who drew up this note that you refer to?

A. Well, I don't know—the signature part of it—I think Mr. Sengstacken did the writing; I wouldn't say sure. I am satisfied Mr. Sengstacken wrote the note that we gave to Hall.

Q. I put in witnesses hands Defendants' Exhibit BB. Do you know whose handwriting the body of that is?

A. Yes, sir.

Q. Whose is it?

A. The body of the note?

Q. Yes.

A. Why, Henry Sengstacken.

Q. And whose is that handwriting on the face of it there. "Paid by purchase of land Mrs. Dora Herrmann."

A. I think that is Henry Sengstacken's. It don't look exactly alike. (Examining.) That must be. I think it is, but I am positive the other is.

Q. In closing this deal on the 30th of August, 1905, you say that you didn't go to Mr. Hall's office, but Mr. Sengstacken was there?

A. That is when we closed the deal when the notes passed?

Q. No, on the 30th of August, when the deed and mortgage were executed?

A. No, I wasn't there at all.

Q. How?

A. No.

Q. Mr. Sengstacken represented you there then?

A. No, he didn't. I thought we were all going to pay our money to the Title Guarantee & Abstract, that is where we agreed to meet. We didn't agree to meet at Hall's office; I didn't suppose any going there.

Q. But you went to Sengstacken you say, and you paid him your money?

A. Just as we all agreed to it.

Q. You paid Sengstacken your money?

A. Sure.

Q. And he took it over and paid it to Mr. Hall?

A. That is what he was to do with it, yes I suppose he did.

Q. And the deed was to be given to the Title Guarantee & Abstract Company?

A. Yes, sir.

Q. According to your understanding?

A. Yes, sir, that was my understanding.

Q. Now didn't Mr. Sengstacken give you a receipt for that money that you paid him?

A. Yes, sir.

Q. Have you got it?

A. Yes, sir.

Q. Produce it will you please?

A. Well, I changed my clothes this morning, and left my book in my room, not thinking to take it out, but I have it.

COURT: You can bring it this afternoon.

Mr. PECK: I don't think he has the receipt for the money; I never saw any receipt for the money.

A. No no.

Q. When did Mr. Sengstacken give you this you refer to, when you paid the money?

A. Well, now, I don't know; but wouldn't that be the proper time?

Q. I don't know.

A. Well I don't.

Q. I am not asking you about the proper time.

A. I don't know but he must have given it to me

at that time.

Q. Did you pay him by check or money?

A. I think that I paid him by—I paid him by two checks, anyway, some on one bank and some on another.

Q. Have you got those checks back?

A. I haven't got them with me.

Q. Have you got them at home?

A. Why sure I have. I surely have; and then I might have paid some money besides, but I rather think all checks. I gave him two checks.

Q. What was the amount you paid him?

A. I paid him my share for $3\frac{1}{12}$.

Q. How much was that?

A. I don't know.

Q. What was it $3\frac{1}{12}$ of \$2200 or $3\frac{1}{12}$ of \$4400?

A. Well, if we were making a one-half payment that day, it would be $3\frac{1}{12}$ of the one-half payment.

Q. Then your understanding is that you paid him at that time $3\frac{1}{12}$ of \$2200, is it?

A. Yes, sir, that is my—that is what I did do; whatever was due that day. I think it was one-half we was to pay down. I paid my proportion, I paid for $3\frac{1}{12}$.

Q. Now you say that when Mr. Sengstacken told you that you could buy this property for \$4000, that you went over to see the land, did you?

A. Yes, I went over to see the land.

Q. And you went over several times afterwards?

A. Oh, I have been on the land for the last forty

years, off and on.

Q. I mean at this time after Mr. Sengstacken and you talked about it.

A. Yes.

Q. And you went back several times before concluding your purchase?

A. I went twice, once alone, and once with Mr. Clinkinbeard, the day they agreed to come in.

Q. You concluded that it was a pretty good buy didn't you?

A. Yes, I thought it was.

Q. At \$4000?

A. I thought it was.

Q. And you thought that there would be considerable of an increase on that price, did you not, on that land? ?

A. I surely wouldn't have bought if I hadn't thought so.

Q. Now at that time how much property were you worth?

A. Well I wasn't worth very much.

Q. How?

A. I don't know.

Q. A man of considerable means, aren't you, and were at that time?

A. Well I remember I borrowed the money to pay this with.

Q. You were a man of considerable means and property at that time, weren't you?

A. I have some property, I have a small farm up Coos River, and I own property around the Bay.

Q. What?

A. I own some property around the Bay, town lots.

Q. What were you worth in property anywhere, Mr. Smith, at that time?

A. At that time?

Q. Yes.

A. Well, I haven't much idea.

Q. Can't you give us a rough guess?

A. Oh, say \$15,000.

Q. How much?

A. \$10,000 or \$15,000.

Q. You say you borrowed the money to make this payment?

A. I remember that, yes.

Q. Who did you borrow it from?

A. I borrowed \$400 from my brother.

Q. What is his name, his christian name?

A. Alvin Smith.

Q. Did you borrow from somebody else, more?

A. I don't remember borrowing from anybody else.

Q. You must have considered it an extra good buy, then, did you not, if you were driven to the necessity of borrowing money to invest in it?

A. Well, I considered it a good buy, or I wouldn't have bought it. I didn't consider it worth anything then, but I thought the time would come that, if we would hold that long enough it would be a good interest account anyway.

And said witness further testified as follows:

Q. Now I understand you to say that notwithstanding that you and Mr. Sengstacken concluded that this was an exceedingly good purchase, that you went around to all of your neighbors—

A. I never said anything of the kind Mr.—

Q. How?

A. I never said that.

Q. You didn't go around to your neighbors?

A. I never said Mr. Sengstacken and I considered this an exceedingly good purchase. I never said that.

Q. Did you consider it was?

A. I considered it would be a good buy. I considered it a good buy or I wouldn't have bought it.

Q. That is what I say.

A. I didn't say exceedingly.

Q. Notwithstanding that opinion, you went around to your neighbors trying to get them to come in on it?

A. Yes, I didn't want so much. I didn't think it good enough, I wanted all of it or half of it.

Q. So you wanted them to reap some of the benefits too?

A. Sure, sure. I wanted to reap some of them too. I wanted to put the money in to help buy it; I got all I wanted.

Q. Then you finally got Mr. Clinkinbeard and Mr. Rogers to invest?

A. Yes, sir.

Q. And then subsequently you concluded it would be a good thing to buy their interests from them?

A. Yes, sir.

Q. Both you and Mr. Sengstacken?

A. Yes, sir.

Q. So that you paid them practically about 300% of an advance on what they had paid?

A. We paid them the sum I named.

Q. When you bought out Mr. Clinkinbeard, how much did you pay him?

A. Sixty dollars an acre.

Q. Sixty dollars an acre; how much in actual money?

COURT: You can figure that out.

Mr. PECK: That is just a matter of computation.

Q. You paid him \$60 an acre for 2 $\frac{1}{2}$ did you?

A. Yes, sir.

Q. Who was it suggested the idea, Mr. Smith, of organizing the East Side Land Company, to take this land, title to it?

A. I think it was Z. T. Siglin—Taylor Siglin agitated it for a long time before we did organize. I think he was the first man.

Q. Did you talk it over with Mr. Sengstacken?

A. Sure, sure.

Q. And you and Mr. Sengstacken and Siglin concluded that you would organize this company in order to take the title to this real property, did you, and then issue shares of stock to the different parties?

A. That is it.

Q. That held the interests?

A. That is right.

Q. Do you know who holds the interest now in it?

A. In this?

Q. All of them?

A. I think so.

Q. Who are they?

A. Henry Sengstacken owns—

Q. How much does he own?

A. One-half the stock, I own 5|12 of the stock; Z.

T. Siglin 1|12.

Q. Comprising all the interest in this land?

A. Yes, sir.

Q. What time was that company organized by you?

A. I don't remember.

Q. What year?

A. I don't remember even the year.

Whereupon said witness further testified as follows:

Q. Have you the certificate you promised to get this morning?

(Witness hands certificate.)

Q. What is this certificate, Mr. Smith?

A. That is the certificate showing my interest, which was given to my wife, in my wife's name, Rosa M. Smith, I had forgotten that was given in her name until I went to bring it up—bring it here, but that is the certificate.

Q. That is the certificate Mr. Sengstacken gave

you for your interest in the property in question?

A. That is for three-twelfths. For some reason I told him to make it out in my wife's name.

Q. Dated September 1, 1905.

A. I don't remember the date, but that is what it is.

Mr. ST. RAYNOR: We will offer the certificate in evidence.

Marked "Defendant's Exhibit FF".

(Testimony of Henry Sengstacken, a defendant, for Defendants.)

Whereupon defendants to support the issues in their behalf, called Henry Sengstacken, one of the defendants, who being first duly sworn, testified as follows:

Direct Examination.

Q. State your age, residence and occupation?

A. Age 61, residence, Marshfield, Oregon; occupation, real estate, abstracts and insurance.

Q. How long have you lived in Marshfield and vicinity?

A. Lived in Marshfield and vicinity since 1874.

Q. To what extent have you been engaged in the real estate business?

A. Off and on for the last thirty years.

Q. For the last ten years, what proportion of your time have you given to the business of buying and selling real estate?

A. For the last ten years—well, we organized the Title Guarantee & Abstract Company in August,

1904, and I virtually put in nearly all my time in the business since that time.

Q. Were you doing any real estate business before that time?

A. Yes, when we had the first boom in 1900 and 1901.

Q. Do you mean 1890 or 1900? Do you mean the Graham boom?

A. Yes, the Graham boom.

Q. 1890?

A. Yes, sir, yes, I was then associated with the Coos Bay Real Estate and Development Company, of which concern I was Vice President and an active worker, handling considerable real estate at that time.

Q. Did you continue in the real estate business from then up to the present time?

A. That organization wasn't kept up; we abandoned that when the boom went down, but individually I have been buying and selling for myself and others more or less between the dates.

Whereupon said witness further testified as follows:

Q. In the purchase of the Norman tract by yourself and your associates, did you secure any water front?

Mr. ST. RAYNOR: I object to that as not the best evidence.

COURT: He can ask what they supposed they were buying.

Mr. ST. RAYNOR: Yes, I didn't mean that, your

Honor, that is all right.

A. We didn't suppose, and we don't now, that we bought any water front with the exception of an easement over Lot 3, to take out any coal or lumber that might be mined or discovered on what is known as the Norman tract that we purchased, including also any coal that might be on lot 3, of Section 36-25-13.

Q. Are you familiar with the title to this land of the Norman tract?

A. I am, somewhat, yes.

Q. Does it run back to any tideland deed from the State of Oregon?

A. Lot 2 of this tract runs to high water mark on Isthmus Inlet and the C. A. Smith Lumber Company, I believe, own the tide land fronting and abutting lots 2, 3 and 4, and they maintain a log boom there at present.

Q. How much land is there between high and low water marks in front of lot 2?

A. There is only a very small strip along there anywheres. If I remember right the tital acreage in that frontage of two lots or three lots—I am not sure whether three lots included in the deed or not—I think it is about three and a half acres, or thereabouts.

COURT: You mean between high and low water?

A. Yes, sir.

COURT: Is there any marsh land in front of the Norman tract?

A. There is some marsh land on lot 2.

COURT: Well, lot 2, I understand is the only part

of the tract that reaches high water line.

A. We have an easement.

COURT: You have an easement over lot 3, but the only part of the Norman tract that reaches to the inlet is lot 2. You have an easement or whatever it is over Lot 3.

A. Yes, that is right.

Q. And you don't claim the title to the tide land in front of lot 2?

A. No, I tried to buy it from or swap it with the C. A. Smith Lumber Company. We offered them our privilege for right of way across Lot 3 in lieu of them giving us deed to the tideland, fronting and abutting tide land to lot 2, so as to give us an outlet to the slough, and we didn't consider our easement for the timber and coal worth very much, because the timber was virtually off the place, and the coal proposition had proved a failure by three or four different parties, so I thought if we could get an outlet to the slough there, I would be perfectly willing to disclaim or quitclaim to them any right we had to lot 3, in lieu of them giving us deed to tide land fronting lot 2.

Q. All of your rights in lot 3 you offered to trade for their rights to tide lands in front of lot 2?

A. Yes, but they wouldn't entertain the proposition.

Q. What do you consider was the reasonable value of the Norman tract of land at the time you purchased same in 1905?

A. I considered the price we paid at that time

was about right, if it had been a great bargain, I would have taken a bigger slice of it at that time.

Q. Did it have any peculiar value to you at that time?

A. My main idea at that time was to get a piece of it—was that I owned the Timberman tract immediately adjoining on the north; 75 acres of that was bottom land, and my idea was to get some more upland with it, to make a ranch at that time. We wasn't figuring on any platting proposition at that time. The idea was to increase my ranch at that time.

Q. What did you consider was the reasonable market value of that tract per acre, in November, 1906, at the time the Hall interest was sold, and the Clinkinbeard and Roger's interests were sold? That was in the fall of 1906, November 26th, I believe.

A. At that time there was some activity on the bay, some stir in real estate caused principally, I think by the fact that—

Q. First answer the question, what do you consider the reasonable market value at that time?

A. The reasonable market value at that time was the price I paid to S. C. Rogers for his two-twelfths interest.

Q. What was it?

A. When was it?

Q. What was that?

A. \$60 an acre.

Q. Now, what were the facts and circumstances

contributing to the rise of value from fifteen to sixty dollars an acre for that tract from the summer of 1905 to November, 1906?

A. In August,—on August 3, 1905, I believe an announcement was made in the *Oregonian*, which reached us on the day—on the fifth, that the Southern Pacific was going to build in from Drain. It made some little stir, especially with the outsiders, but the home people still took it with a grain of salt, having been fooled before; didn't take as much interest in its as we would otherwise; but later, when the Southern Pacific took over the interest—the Spreckles interest in the local road, and the mine at Beaver Hill, people took some stock in the deal, and that increased the value. A little later on, I think it was in the fall of 1906, the Smith Lumber Company arranged for the sale of the Deane Lumber Company's holdings on Coos Bay, which I believe, was consummated—the title was transferred early in 1907. That, I think, had more to do with raising values than most anything else, when they started in to build that new mill—remodel the East Side mill. In fact, in Marshfield, no large buildings of any permanent character, that is brick buildings, were put up until about that time. That gave people confidence to invest and improve.

Q. What about the Courtney Mill? When was that put in, and where?

A. The Courtney mill, I think, was built during 1906, up Isthmus Inlet, on the west side, about two

miles south of Marshfield. That made some stir up towards Millington. There is a town platted there by the name of Millington, and quite a number of lots were sold there, I think, during the fall of 1906, and spring of 1907.

Q. Now, relate in your manner, the circumstances and facts surrounding the initiation and consummation of this sale of the Norman tract to yourself and associates?

A. Repeat that question, please. (Question read.) I had, as I said before, the purchase in my mind for some time, on account of joining my Timberman tract, and I was told about this time, about the 17th of May, or just before that, that Mr. Buckman had made an offer for the tract; Mr. Buckman at that time lived at the East Side;—that he had made an offer of \$3500 for the Norman tract, \$3500 cash, and I met Ren Smith in town one day. He and I had been doing some business together before, and I suggested to him that we would go in together and take it in, perhaps he could take part of it. I am not sure if he agreed that day or not, but anyway very soon afterwards—he looked into it some—he agreed to go in with me, and we would take it. So he and I went up to Judge Hall's office, and ascertained what he would sell it for, on terms of half down and half on time. He said he would take \$4400, so we agreed to take it on the terms of half cash and half in one year, interest six percent; and we at that time gave him our joint note, payable ten days after date for \$100, as part pay-

ment of the land.

Q. Is Defendant's Exhibit BB that note?

A. Yes, sir, that is the note.

Q. Did you make out that note?

A. I made that note out.

Q. And did you put the endorsement across the face here, "Paid by purchase of land. Mrs. Dora Horman?"

A. I did that when it was redeemed, yes.

Q. On August 30, 1905, did you make that endorsement?

A. Yes, when I got the note back. I don't know the exact date.

Q. Did you cut the signature off that date?

A. I did. That is the way I generally cancel my notes; cut the name off.

Q. Whose names were signed to that note before you cut them off?

A. Henry Sengstacken and L. D. Smith.

Q. Now, proceed with your testimony.

A. When we paid him the note, my recollection is that we took a receipt for \$100 on account, describing the land and the terms, and subsequent to that we proceeded to interest other people in the deal. I believe we had some little understanding as to who we would take in, that is, take in people that would be agreeable, and people that could afford to buy and pay for it. So we made up, I think, a little list of whom we would see. I think, amongst others, I saw Stephen Rogers, E. A. Anderson, Taylor Siglin, D. L.

Rood; Taylor Siglin refused to go in. So did Mr. Anderson. But Mr. Rogers, after considering it, agreed to take a one-sixth interest, and D. L. Rood agreed to take a one-twelfth interest. I think that Mr. Smith arranged with Mr. Clinkinbeard for his interest, I think he did the talking to him. Shortly after this first transaction at Hall's office, that I speak of, Mr. John F. Hall went to the city, I believe. He was gone some four or six weeks, I don't know exactly as to the time, but about that time, and when he came back, I went to him with a view of closing the deal. I am not positive if he had secured the abstract at that time or not. I believe he had to order it from Mr. Hacker, who was then making abstracts, but I believe the abstract was held up waiting for a sheriff's deed, which had not been recorded, and was not recorded until the 26th of August, 1905,—24th of August, 1905. Then, after that was recorded, the title was passed upon by my attorney who was Mr. C. A. Sehlbrede, and the day for making final payment was then set for August 30, 1905. On the morning of August 30, 1905, when the Coos River boats came down, which arrived in Marshfield about ten o'clock, I saw—I should have stated there before, that among those I saw were Herbert Rogers, who also agreed to take a one-twelfth interest. And this morning of the 30th of August, 1905, when the boat arrived, on which Herbert Rogers was working, he informed me that he had changed his mind about taking his one-twelfth interest; that he didn't consider it an extra invest-

ment, or words to that effect. I believe that Mr. Stephen Rogers, his father, came down that morning, and so did Mr. J. J. Clinkinbeard, and I expected that morning that they would come to my office; that is, to make payment in there, but found out afterwards that they had gone direct to Mr. Hall's office, and paid their money in to Mr. Hall. L. D. Smith paid the amount of this three-twelfths in to me. I think it was in checks on Flanagan & Bennett Bank, and D. L. Rood also gave me his check for his one-twelfth interest, and I went up to Hall's office, and told Mr. Hall that all the men who had agreed to take an interest with us were here, but that Herbert Rogers had backed out, and would not take his interest. I says to Hall, "What's the matter with you taking his interest? You are getting a commission out of this for selling this land, and you might as well take this interest to close it up." He replied that he didn't know, but he would talk it over with Tom. And I paid in to Mr. Hall the amount of my three-twelfths, Mr. Rood's one-twelfth, and Mr. L. D. Smith's three-twelfths, and I believe the matter was left open until the next morning to decide whether or not Hall would take the interest. I believe that he remarked that if he didn't want to take the interest, that he would trust me for the other part due on the payment. The next morning I saw Hall again, and he said that he had talked it over with Tom, and that they had concluded they would take the interest.

Q. Did the deeds pass at that time, and the mort-

gage?

A. Yes, sir.

Q. Now, what was done with the title to the property, and when was that agreed upon?

A. It was agreed upon beforehand that the title should be put in the name of the Title Guarantee & Abstract Company, Trustee, in order to avoid the trouble in transferring; in case any of the parties in the venture would die, it wouldn't tie the property up, so we concluded it would be easier to handle it in that way by putting it in the Title Guarantee & Abstract Company, as trustee for the parties interested.

Q. Where is the receipt which was given you by John F. Hall on May 17, 1905?

A. I don't know. I have been looking for it, but I have been unable to find it. Since that transaction, I have moved my office three times. The last time I moved from the Flanagan & Bennet Building; considerable of my old papers were in the back room and rained upon, and in moving into the new quarters where I am now, I destroyed considerable of my old record, which I thought were past age, and I had no further use for, and some without overhauling, and it is possible it may have been destroyed, and it is possible I may have it yet among my papers. At any rate, I haven't been able to locate it.

Q. Have you made a careful search for it?

A. I made quite a search.

Q. Did you consider that receipt of any value after you got your deed?

A. No, I didn't consider it of any value. I thought the proposition was closed.

Q. What became of the title to the property in later years?

A. We afterwards platted a portion of it into lots, and I also platted a portion of my own property that I got from Timberman in the same plat, called East Side. The plat was produced here in evidence; and later we platted another forty, colled the Home Addition to East Side in larger lots. We thought they might sell to the mill employes over there, but they didn't go so very fast after all, and in selling some of these lots in the East Side, we run against objection the way the title stood, that is, this Trustee title business was not considered very satisfactory at the best, and to overcome that, and bring everything clear into the proper owners, we concluded that we would incorporate, and have everybody who had ever had anything to do with the land, deed into this corporation incorporated in the name of the East Side Land Company.

Q. And does that company hold the property at the present time?

A. They hold the property now.

Q. And among whom is that stock divided?

A. I own 50 per cent, or one half—six-twelfths, and L. D. Smith five-twelfths, and Z. T. Siglin one-twelfth, or, in other words, the stock—, we incorporated for \$9600 at \$10 a share. Consequently L. D. Smith had 400 shares, Z. T. Siglin 80 shares, and my

proportion was 480 shares of it. I subscribed for 478 shares, I believe, my wife one share, and Mr. Street, at that time my secretary one share, making the amount.

Q. Does Mr. Street hold the legal title to that one share in trust for yourself?

A. He does not now. When he resigned as secretary, he transferred the stock back, and at the present time that one share is held by A. E. Morden, my present secretary.

Q. And that is the present ownership of the shares of stock in that East Side Land Company?

A. It is.

Q. Can you locate the shipyard testified to by W. W. Graves in this case? Can you locate it upon any of these exhibits?

A. I can locate it better on the East Side Map than on anything.

Q. Well, perhaps you can locate it on this map, (Plaintiff's Exhibit A).

A. I can locate it on that. That shipyard was located on this Bay City, west of the old East Marshfield platting, and pretty near opposite the present large Smith mill, or a little below it—a little below the Smith mill. It is in the Bay City plat. It lies immediately west of the East Marshfield plat, which was platted by the East Marshfield Land Company, George Holcomb.

COURT: How far is it west from Lot 2—the north line of Lot 2?

A. It is about three-quarters—oh, about half a mile southeast from it.

Q. Southeast, no. The mill is about three-quarters of a mile northwest.

A. (Indicating on map) This is south, and that is east. This runs east and south. The slough turns here.

COURT: I understood you to say the shipyard was down here?

A. Yes.

COURT: That would be west from Lot 2.

A. This is east and this is west (indicating).

COURT: Here is Lot 2.

A. Yes.

COURT: Then the shipyard would be west.

A. Yes, yes. I thought you asked what direction Lot 2 is from the shipyard. Yes, that is right.

Q. Has there been anything doing in that shipyard for a long time before 1905?

A. No, there hasn't been anything done there. The last man that was doing business is Reed. He tried to build a ship there, which was in frame for a long time. It was never finished, and the frame rotted down, and was made into fire wood.

Q. Did you have any knowledge or notice of any kind—or any suspicion that Mr. Hall or James T. Hall, or Hall & Hall were to take any interest in this property, prior to August 30, 1905, when you made the suggestion to John F. Hall that he take the Herbert Rogers' interest?

A. No.

Q. Had there ever been any talk between you and Judge Hall or between you and Hall & Hall to that effect, or upon that subject before that time?

A. None whatever.

Q. What evidence of the equitable ownership of this property was issued by the Title Guarantee & Abstract Company?

A. Some little time after the deed had passed, I issued a certificate showing each parties' interest, with the exception I don't believe I issued one to myself, but to all the rest of them.

Q. Is Defendants' Exhibit CC one of these certificates?

A. Yes.

Q. Were they all duplicates of this except as to the name of the owner of the interest, and the amount of the interest which was covered by the certificate?

A. Yes, they were the same wording, all of them.

Q. From whom did you acquire the additional three-twelfths interest, and when, which went to make up your half interest in the property?

A. I bought D. L. Rood's one-twelfth interest, and S. C. Roger's two-twelfths interest on November 26, 1906.

Q. Well, did you purchase an interest from Christensen that Hall had theretofore conveyed to Christensen?

A. Later on; I will see if I can tell you what date it was.

Q. Give the dates and the amounts per acre of your respective purchases of those interests.

A. I bought Mr. Rood's and Mr. Rogers' interest at \$60 per acre November 26, 1906, and on March 24, 1908, I bought W. O. Christensen's interest for—I think it was about \$100 per acre. I paid him \$2,-103.38, deducting I think, in this case, the unpaid portion of the mortgage that would be due on this one-twelfth, which would make the gross price, I think, \$100 an acre.

Q. Where did Mr. Siglin get his interest from? What interest is the Siglin interest?

A. Mr. Siglin bought his interest from L. D. Smith and myself; it was the Rood interest that we let go again. We bought an interest from Rood, and sold it shortly after this to Mr. Siglin.

Q. Then at the present time, you hold, of these original parties—you hold the interest of yourself and S. C. Rogers and John F. Hall?

A. Yes, which I bought from Christensen.

Q. And Z. T. Siglin has the interest of D. L. Rood; and L. D. Smith has the interest of himself—

A. And J. J. Clinkinbeard.

Q. J. J. Clinkinbeard.

Whereupon said witness further testified on direct examination in substance, as follows:

That he had made an examination as an abstractor of the records of Coos County to ascertain what conveyances of land were made in 1905 in the four townships nearest the Norman tract, and that he had

caused a plat to be made showing said conveyances and transfers of land in 1905, which plat was admitted in evidence and marked "Defendant's Exhibit DD;" and that during the year 1905 there was no other conveyances or transfers of land lying between Catching and Isthmus Sloughs except the transfer of the Norman tract involved in this litigation; that during 1905 there were only three transfers of land South of Marshfield on the West side of Isthmus Slough.

Whereupon said witness on cross-examination by solicitor for complainant, testified as follows:

Cross-examination.

Q. You were the first one, were you, Mr. Sengstacken, that broached the subject of buying this Norman tract of land from Mr. Hall?

A. Yes, I think that I saw him about it before we went in together with Mr.—at the time that Smith and I went in on the 17th.

Q. You and Mr. Smith talked it over together first, did you?

A. Yes, we talked it over after I had found out that this party had made the offer of \$3500.00.

Q. Now, what time was that?

A. That was in May, 1905.

Q. Now, had you prior to that time endeavored to secure this tract of land?

A. Yes, sir.

Q. Whom did you try to buy it of before?

A. Well, I applied—I was talking about it to Mr.

Hall.

Q. How long before?

A. I think it was in the fall of 1902, or the spring of 1903, the first time I negotiated for it.

Q. Is that the time that Judge Hall spoke about on the witness stand that you told him that you thought you could do better than what he had given you the figure for?

A. Yes, that is the time.

Q. What figure did he give you then?

A. Well, I am not positive, but I think it was \$4,000.

Q. And you told him that you thought you could get it—

A. Better.

Q. —at a better figure than that?

A. Yes.

Q. Now, did you have any correspondence for the purpose of obtaining the property?

A. I think I wired to Mrs. Norman, and she did give me a better price than he had offered me.

Q. She gave you a better price than he offered you?

A. Yes.

Q. And then you made arrangements to purchase it, did you?

A. Yes.

Q. How?

A. Yes.

Q. On the wire that you received from Mrs. Herr-

mann, did you?

A. Yes.

Q. Have you got a copy of that wire?

A. No, I haven't. In fact, I hadn't thought anything about it until this case came up.

Q. Do you know what that was—what the telegram was, what it contained?

A. Well, no, only that I was asking her best price, but I couldn't—it is so long ago, that I don't remember much about it.

Q. And she gave you the price in the telegram did she, in this wire that you speak of?

A. I am not sure if she answered by wire or letter.

Q. Well, it was from Germany that you got the answer, did you?

A. I am quite sure that I wired her.

Q. You got the answer from Germany?

A. Yes, sir.

Q. What year was that?

A. I think it was either late in the fall of 1902, or 1903. It is so long ago, I haven't charged my mind.

Q. How much was it that you got the price from her for, at that time?

A. I wouldn't be positive as to that, but my recollection of it was that it was \$3500.

Q. And why did that deal fall through?

A. The reason it fell through was that after getting the abstract of the property, my attorney turned the title down, on account of what he claimed to be a

defective foreclosure of the property against Holcomb of the Coos Bay Land Company.

Q. Did Mrs. Herrmann send you a deed to it at that time, and you turned it down on account of this?

A. I am not positive if the deed was sent or not. It may have been. The chances are it was. I am not positive.

Q. You have some recollection of a deed being sent to you, haven't you, and then on account of this defect that you discovered in the title, you turned it down?

A. Yes.

Q. What did you do with that deed?

A. Well, I never—it wasn't sent to me. It was sent to Judge Hall, I suppose.

Q. Sent to Judge Hall?

A. Yes.

Q. And he showed it to you, did he?

A. I have no recollection of it, but I suppose he did; I suppose he did. I don't remember much about it.

Q. I suppose the deed expressed the consideration that they were selling it to you for when you turned it down, did it?

A. I suppose it naturally would.

Q. I will place in the witness' hand a deed, and ask you if you have seen that before?

A. Well, I am not sure whether I ever saw that before or not, I haven't any recollection of it.

Q. Do you remember seeing the deed you say

was sent to Judge Hall?

A. Well, I am not positive about that. You see, the deal wasn't turned down on account of the deed. The deal was turned down on account of the title, and I don't know if the deed was really—the parties signed the deed or not; but I am not positive about the price. It may have been the consideration. I wouldn't swear. I hadn't thought any more about it.

Deed marked "Plaintiff's Exhibit 30" for identification.

Q. Did you have any negotiations at any other time than in the fall of 1902, or during the summer of 1902, for the purchase of this Norman tract, other than the time that you did in 1905?

A. I think I tried to buy a portion of it joining with the Timberman tract, but I don't remember the particulars.

Q. When was that, Mr. Sengstacken?

A. Well, I don't know as to the dates. It must have been,—I suppose, since I bought the Timberman tract, I bought that in 1902.

Mr. PECK: The correspondence shows that.

Mr. ST. RAYNOR: Shows what?

Mr. PECK: Shows the date you are trying to get at.

Mr. ST. RAYNOR: No, I am asking him if he made any other effort to buy this tract, other than in 1902, and 1905.

A. As a tract?

Q. The Norman tract.

A. Well, I am not sure. I am still under the impression that the price for that that time made me was \$3500. I don't know if there was any deal between those two deals or not.

Q. That is not what I am asking you, Mr. Sengstacken. I am asking you if you made any other effort at any time other than 1902 and 1905 to buy this Norman tract?

A. Not that I remember of.

Q. And did you make more than one effort to buy it through correspondence with Mrs. Herrmann in Germany, than once in 1902?

A. Well, I am not sure as to dates. There was only at one time that I took it up with her direct, as far as I remember, but I think I was negotiating for a portion of the tract through Mr. Hall, between the time that I bought the Timberman tract, and the time—

Q. What time was that, Mr. Sengstacken?

A. I couldn't tell as to the dates.

Q. You say you bought this because you wanted a ranch, on account of it joining with your Timberman tract. Is that true?

A. That was my main object.

Q. Your main object? What kind of a ranch did you want?

A. Well, the Timberman ranch has 75 acres of bottom land, right on Coos River, and this tract, the Norman tract butts onto it on the south. My idea was to get additional main land so as to square off the

ranch.

Q. For the ranch?

A. Yes.

Q. Were you running a ranch at that time?

A. No, I wasn't running a ranch, but I was buying and selling ranch land, as well as other kinds.

Q. But notwithstanding you wanted it as a ranch, you thought you would take five or six others in partnership with you, did you?

A. Yes, because I didn't want the whole tract. I thought in that way, I could probably divide it, and get the piece out of it that I wanted; the parties didn't want to sell a small piece of it.

Q. But you didn't carry out that project afterwards?

A. No, things turned differently afterwards, and we used it for other purposes.

Q. When did you buy in the Timberman tract?

A. December, 1902.

Q. And then—in December, you say?

A. December, 1902.

Q. Now, was it that time that you formed the idea of trying to get the Norman tract?

A. The first time—this deed refers to—that was another time. That was before I bought the Timberman tract.

Q. Yes.

A. I think at that time I had some other party on to sell it to, but the negotiations since that, I think, were in 1903, after I bought the Norman tract, to get

part of it.

Q. In 1903? After you bought the Norman tract?

A. No, I bought the Timberman tract, in December, 1902, and I tried, I think, to get part of the tract—of the Norman tract after that in 1903, I think it was.

Q. Now, whom did you try to buy that from?

A. That was from Hall & Hall—from John F. Hall.

Whereupon said witness further testified on cross-examination as follows:

Q. Did you go over with Mr. Smith to see this land, before you negotiated with Mr. Hall for the purchase of it?

A. I don't think I went over the ground with Mr. Smith at that time. I was somewhat familiar with the tract, owning the Timberman tract adjoining, and in a general way I knew how it lay on the ground.

Q. You were pretty well conversant with it—

A. Yes.

Q. As a matter of fact?

A. Yes.

Q. And had known it for some time?

A. Yes.

Q. And you say you suggested the purchase of it to Mr. Smith? And he, after thinking it over, agreed with you on the purchase of it?

A. Yes, I think I made the proposition to him—suggested the idea to him.

Q. Were you the one who suggested to him what

it could be purchased for?

A. Yes.

Q. And what did you tell him?

A. I told him it could be bought for \$4400 on terms.

Q. \$4400.

A. Yes.

Q. On terms, and then, you say you went to see Mr. Hall in reference to it. Did you both go to Mr. Hall?

A. At the final finish, we both went, but I had been—I had seen Mr. Hall before that to get the price.

Q. Well, who made the arrangement with Mr. Hall, you, or you and Mr. Smith together?

A. We made the arrangemnt together.

Q. Were you both together talking with Mr. Hall at the same time?

A. We were both together at that time in his office.

Q. When was that?

A. On the 17th of May, 1905.

Q. What is it that causes you to locate the date as the 17th of May—from your memory?

A. No, in fact, I had forgotten the exact dates when this happened, but in hunting up my notes—in hunting up this note, that refreshed my memory as to that particular date. Otherwise, I wouldn't be positive as to dates that far back.

Q. When did you hunt that up?

A. During this litigation.

Q. What portion of the litigation?

A. It was after the second complaint was filed.

Q. Now, you say that you have searched to find this agreement that you say—the receipt that Judge Hall gave you?

A. Yes.

Q. Where did you search for it?

A. Amongst my old papers.

Q. When did you search for it?

A. Oh, with the last—within the last month.

Q. Now, after you had made this arrangement, as you say, did you communicate to any one around Marshfield, that you had purchased this property?

A. After we made this first deal with Hall, you mean?

Q. After this 17th of May that you have spoken about? When did you tell any one that you and Smith had purchased the property?

A. I couldn't tell you as to dates, but I think it was reasonably shortly after that. I don't know if we waited for the title to be examined, before we asked these other parties in or not, but my recollection is that was—well, as to dates, I haven't any recollection.

Q. Weren't you able to buy this property yourself, Mr. Sengstacken, at that time, without taking in five or six other parties?

A. If I had considered it was such an awful good buy, I think I could have strained a point and taken it in by myself. While I am never very flush, but when

I see a very good buy, I can usually manage—

Q. Manage to take it in out of the cold?

A. Yes, I couldn't draw a check for as much money as some of the witnesses testified to here, and have the banks pay much attention to it, but any reasonable amount to run my business.

Q. Now, when you went to see Judge Hall on the 30th of August, did any one accompany you?

A. I don't hardly think there was. I won't be positive. I don't think so.

Q. Now, what is it that causes you to fix that as the date that you had this transaction which you have testified to with Judge Hall?

A. Well, it was the day that was set for the final payment.

Q. And you are positive of that day, are you, being the 30th of August, 1905?

A. Yes.

Q. When you and Smith met, and you say this boat came in with Herbert Rogers?

A. Yes.

Q. What was he doing—working on the boat?

A. Yes. He was deck-hand on the boat. His father was running the boat.

Q. Had you prepared the mortgage and note that you delivered to Judge Hall at that time?

A. I think the mortgage was written by Judge Hall.

Q. Drawn up by Judge Hall himself?

A. I am not positive now, but I think—I am not

positive if it was done by us or Judge Hall. I wouldn't swear to that. Anyhow, the papers ready to close up on that day.

Mr. ST. RAYNOR: Have you that original mortgage?

Mr. PECK: Chandler has that, you know. It went to Chandler.

Q. Well, was the note returned to you at any time, that you gave to Judge Hall?

A. Yes, it is here on the table.

Q. I mean the \$2200 note that was secured by mortgage?

A. No, we haven't got that back yet. I understand it was assigned to Mr. Chandler with the balance of the mortgages.

Q. And you have not redeemed it yet?

A. Not in full.

Q. How?

A. Not in full. Made payments on it since.

Q. Now, when did you execute that mortgage and note to Judge Hall? On the 30th of August, the same date that he executed the deed to you?

A. Yes, as far as I know.

Q. Well, have you got your books here—your corporation books? Will you produce them, please, of the minutes of that date?

A. Yes—no, I haven't got the corporation books, but the abstract will show that date, the abstract of the transaction.

Q. No, I want the corporation books, Mr. Seng-

stacken, of your minutes showing the execution of this mortgage.

A. No, I haven't got that here.

Mr. PECK: There is no such thing as that.

Mr. ST. RAYNOR: No such thing as the minutes of the corporation?

Mr. PECK: Not on that date. He had a general power to execute these conveyances as general manager and president—a standing blanket authority. There wasn't any action of the directors taken in reference to this particular transaction.

Q. Well, how was the mortgage executed by you, Mr. Sengstacken? I have never seen it.

A. It is in the abstract there for your convenience.

Mr. PECK: It is in your pleadings.

Mr. ST. RAYNOR: No, not the mortgage.

Q. Did you and the secretary execute it?

A. Yes.

Q. Over the seal of the corporation?

A. Yes, as far as I know.

Q. But you had adopted no minutes of the corporation by a directors' meeting, directing you to execute it?

A. Not that I know of.

Q. Well, wouldn't you recall it, if there was such a thing?

A. I think I would but I don't think there was anything of the kind. I think my power that I had was sufficient—

Q. You had a general power from the corporation to you—

A. As general manager.

Q. —and the secretary, to execute instruments of that kind?

A. Well, as the general manager of the company.

Q. In the minutes?

A. No, as the general manager of the company and president.

Q. Let me understand you. What you mean, is that the corporation—the board of directors had adopted a resolution, empowering you and the secretary to execute such instruments as this.

A. Yes, that is the way I understand it.

Q. Previous to this time?

A. Yes.

Q. And under that general power, you and the secretary executed this mortgage?

A. Yes.

Q. And note?

A. Yes.

Q. Now, did you have any—I see that it is executed by you as president, and Mr. Sehlbrede as secretary. Is that correct?

A. That is correct.

Q. The mortgage?

A. Yes.

Q. Mr. PECK: May it please the Court, we don't care. We are perfectly willing they should go into this as far as they want to, but I don't see the ma-

teriality.

COURT: I was wondering what it had to do with this case, whether they had authority to execute it or not. This is not a case to foreclose a mortgage, no question about the validity.

Mr. ST. RAYNOR: That is true, but I wanted to get the data surrounding and in regard to the transaction.

Q. And you delivered this mortgage to Judge Hall?

A. Yes.

Q. On this 30th of August, 1905?

A. Either 30th or 31st.

Q. And he delivered the deed to you—is that true?

A. Yes, he delivered it to me.

Q. And you placed it on record, did you?

A. Subsequently, yes.

Q. And you say that when this Herbert Rogers told you that he would not take his one-twelfth, you then requested Judge Hall, on account of he having some commission coming from the property, that he take that twelfth?

A. Yes, in order to close it up. I just made an off-hand remark; I says, "John, why don't you folks take this interest here? You are getting a commission for the sale of this land anyway?"

Q. Then afterwards he reported to you—

A. Yes.

Q. —that he and his brother would take the one-twelfth?

A. Yes.

Q. And then the transaction was closed, was it?

A. Well, it was virtually closed before that; he promised to give me time on the other one-twelfth; if he didn't I guess it would have been closed anyway. But, as a matter of fact, I guess it wasn't closed till he took his.

Q. Well, after you had agreed with him, or he had agreed with his brother, and announced to you that he and his brother would take the one-twelfth, then you closed the transaction, and executed the deed and mortgage. Is that true?

A. Yes, I guess that is correct.

Q. Have you got those checks, Mr. Sengstacken, that you gave to Mr. Hall for payment on the 30th of August, that you spoke about, that you would get?

A. Well, the checks were returned; the Smith checks, and the Rood checks, of course, they were drawn on the Flanigan & Bennett Bank, and I suppose they were returned.

Q. But the check that you gave?

A. I have the check that I gave, yes.

Q. Have you got that with you?

A. I have. (Produce it.)

Q. Then, the sum of \$544.85 is the sum that you paid to Mr. Hall, was it?

A. Yes.

Q. And the other moneys came from Rood and—

A. Smith, also in checks. The checks were returned to them.

Mr. ST. RAYNOR: We offer this in evidence.

Marked "Plaintiff's Exhibit 31." (which is hereto attached and made a part hereof.)

COURT: What was the amount of the Rood check, do you remember?

A. I think it was one hundred and eighty odd dollars. That is, his one-twelfth of \$2200.

Mr. PECK: \$183.33.

COURT: And Smith's check?

A. Would be three times that.

Whereupon, on redirect examination, said witness testified as follows:

Redirect Examination.

Q. One-fourth of \$2200 would be \$550 and this check, Plaintiff's Exhibit 31, shows \$544.85. Do you know how the balance of \$5.15 was made.

A. Well, there was a ten dollar attorneys fee paid Mr. Sehlbrede on the same date for examining the abstract, and probably the difference, after the others paid in their proportion of same, offset that for that abstract, and I paid in that much, less, probably—figuring up.

Q. How much did you pay for your interest? \$550 or \$544.85?

A. I think I have the book there. I think it cost me \$550 in the book.

Q. Have you your ledger account of this?

A. I have.

Q. Will you produce it please?

A. (Producing book) "1905, August 30th, to cash, Norman East Marshfield interest.....\$550.00

Q. And what is the date of that entry?

A. August 30, 1905.

Q. Your check purports to be dated August 31, 1905. Which is right?

A. Well, I may have been mistaken in dating the check; might have been late in the afternoon; I guess the book is right.

Mr. ST. RAYNOR: What is that? The book entry, you say?

A. August 30, 1905.

Q. I call your attention to the fact that the deed and mortgage are both acknowledged on August 31st; that being so, what do you want to say about the date of the delivery of this deed and mortgage?

A. Well, if they were acknowledged on that date, I suppose they were not delivered until then, I should judge.

Mr. ST. RAYNOR: You suppose what?

A. If they were not acknowledged until the 31st, I don't suppose they were delivered until the 31st, unless they made a mistake in the date of the acknowledgement.

Mr. ST. RAYNOR: Did you acknowledge them?

A. No, I didn't.

Mr. ST. RAYNOR: Well, didn't you acknowledge the mortgage?

A. Oh, yes, but I thought you meant—

Mr. ST. RAYNOR: Whom did you acknowledge

it before?

A. I don't remember that. It is in there in the abstract, it shows.

Mr. PECK: The abstract shows, I think, J. T. Hall.

Mr. ST. RAYNOR: In whose office did you acknowledge it?

A. If it was acknowledged before J. T. Hall, I guess it was acknowledged in Hall & Hall's office. I didn't—I don't remember positive, but that would be the conclusion; if James T. Hall was the notary. I think it was done in Hall & Hall's office.

Mr. ST. RAYNOR: There is nothing here to indicate before whom it was acknowledged.

Mr. PECK: The abstracts are made different, I guess from yours. There is the acknowledgement there.

Mr. ST. RAYNOR: Well, it states here that it was acknowledged before James T. Hall.

A. Yes, that is the brother of John F. Hall.

Mr. ST. RAYNOR: Do you remember the circumstances of acknowledging it before him?

A. Not in particular, but the acknowledgement itself is evidence it was done there.

Mr. ST. RAYNOR: But independent of that, do you remember acknowledging it before him as notary public?

A. No, I wouldn't have been positive where it was done, now, at this time.

Mr. ST. RAYNOR: But you know it wasn't de-

livered until after the date of the acknowledgement?

A. No, I don't think it was.

(Deposition of Defendant, S. C. Rogers for defendants.)

Whereupon solicitors for defendants, read the deposition of S. C. Rogers, one of the defendants, herein taken, pursuant to notice and stipulation of solicitors for complainant and defendants, at Marshfield, Oregon, on November 18-1912, who being first duly sworn according to law, testified in substance as follows:

Direct Examination.

That he is 78 years of age, and lives on Coos River; that his business is farming and steam boating; that he is a director in the First National Bank of Marshfield; that he is worth about \$50,000.00; that he has lived in that community about forty two years; that he knows about the purchase of the Norman tract, through John F. Hall, her attorney in fact, in 1905; that Henry Sengstacken came to him, and told him that there was a tract of land to be sold, and wanted to know if he had any spare money that he wanted to invest, and he asked Henry Sengstacken what it was, and Sengstacken told him what it was, and he concluded to take a small share (2-12); that he thinks this was the fore part of August that Henry Sengstacken came to him, and that he thought it over, a few days and concluded that he would take a chance; that Clinkinbeard and Sengstacken and L. D. Smith

and Rood and Herbert Rogers, were to take an interest in this land; that he does not remember the particular interest each of the parties was to take, but he thinks it was divided 2|12 to each one, but he thinks Clinkinbeard took only 1|12, and he is not sure whether Herbert Rogers concluded to take 1|12 or 2|12; that he paid his share of the money in John Hall's office about the last of August; that Smith was present at the time of paying the money, and he thinks defendant, Clinkinbeard might have been there; that he does not remember how much money he paid at that time, but he thinks it was \$1500.00; but that he won't say that it was but a thousand; that he has books that will show exactly what amount he paid in, and that he will bring them in later for further testimony; that at the time he paid his share of the money to John F. Hall, he saw the deed, that Mr. Hall had the deed, and that it was read to him at that time; that defendant, Clinkinbeard was present during all this time, and that he encouraged Clinkinbeard in taking an interest; that the deed was read to him before he paid his money; that he thought upon the payment of his money and the acceptance of the deed closed the bargain; that at the time he did not know that John F. Hall or Hall & Hall was to take an interest under the deed; that he did not have any suspicion that John F. Hall, or Hall & Hall were to acquire any interest under the deed at that time, but thought that they were doing the work for another party, and were getting others to take stock.

Whereupon said witness further testified as follows:

Q. How long before you found out that Hall and Hall had acquired any interest in this property?

A. Oh, I should think a month.

Q. When Sengstacken approached you, what was your understanding on the proposition as to whether Sengstacken and Smith had already purchased the property, what was your understanding on that proposition?

A. No, they hadn't; my understanding was they hadn't.

Q. You understood that you were going in and buying a two-twelfths interest in the property?

A. Yes.

Whereupon said witness upon cross-examination by solicitors for complainant, testified as follows:

Cross-examination.

Q. Mr. Rogers, what did you say you paid for your interest in this land?

A. Well, I was trying to think; my memory is not as good as it used to be, but I think it was \$1500—I think it was.

Q. And how large an interest were you getting?

A. Two-twelfths; let see—that would be how much—yes, it was two-twelfths that I got.

Q. And you think you paid fifteen hundred dollars for it?

A. Yes, I think so.

Q. You have some books or memorandum showing exactly what you paid for it?

A. Yes, I think so.

Q. And you promised to bring those tomorrow to this office?

A. If I can find them, an account of it.

Q. Now, Mr. Sengstacken approached you in regard to this deal in the early part of August, you say?

A. I think so.

Q. Of 1905?

A. Yes.

Q. Can you fix the exact date?

A. Well, I couldn't exactly, but I think; well I don't know whether I have any way of telling the exact time that he approached me or not; I don't know; I don't hardly know whether I could tell.

Q. It was the last of August that the deal was closed and you paid your money in?

A. Yes.

Q. Who read the deed to you that day?

A. John Hall.

Q. And before you paid your money?

A. Yes, sir.

Q. You knew before you paid your money that John F. Hall was signing the deed as attorney in fact for Dora Herrmann, didn't you?

A. Yes.

Q. You knew that John F. Hall had been her attorney in fact, and legal and confidential adviser for a number of years prior to this?

A. I didn't know; it was something I hadn't paid any attention to.

Q. Didn't you know in a general way that he had been looking after all of her business here?

A. I didn't know that, I couldn't say that I did.

Q. You were interested in a business way with Mr. Hall, weren't you, prior to that?

A. No, nothing, sometimes he occasionally done little jobs of work for me that I would consult him on, little matters on something, deeds to make out or something of that kind.

Q. Who was your attorney, then?

A. Mr. Bennett is generally my attorney, Mr. J. W. Bennett.

Q. But Mr. Hall did act as attorney for you?

A. Occasionally, yes.

Q. Now, to whom was this deed made out?

A. Well, my memory is not as good as it used to be it is not revived enough, and I cannot recollect like some people, and would I not say; I was looking out for my own interests, but I knew the parties that were on it; that was myself, J. J. Clinkinbeard, and Henry Sengstacken, L. D. Smith and Rood, I think, and Herbert Rogers—Herbert—I think he and Clinkinbeard was to take 1|12 apiece, I think that was the way.

Q. Was the deed made to yourself, Clinkinbeard, Herbert Rogers, Rood, and L. D. Smith?

A. Well, I won't say that it was; I won't say that Herbert's name was inserted or not; I wasn't.

Q. But your name was in the deed as one of the grantees

A. Yes, my name was in it, yes.

Q. Do you know how it was, when the transfer was actually made, that the land was deeded to the Title Guarantee and Abstract Company in place of to you and the other grantees whose names you say appeared in the deed that was read to you?

A. I sold my right to Sengstacken and Smith.

Q. When did you sell your right to Sengstacken and Smith?

A. Well, I couldn't recall the date now.

Q. About how long after the last day of August, 1905, was it?

A. Oh, it was probably—it seems to me it was two or three months after that.

Q. What price did you get for your interest that you sold out?

A. I was to get \$60 an acre.

Q. Sixty dollars an acre?

A. Yes.

Q. And what did you understand that you paid an acre for it?

A. Fifteen dollars, I think.

Q. And that was about three months afterwards?

A. Well, I would not say; it might have been considerable longer; I can tell by my books and by the note that was given to me for the—

Q. And your books will also show, will they?

A. Well, I could not say whether they will or not.

Q. Well, will you bring those tomorrow when you bring the other books so we can see?

A. Yes, I will look up what I can that have reference to it.

Q. Just bring all of your books dealing with this transaction, and we will look them up, and the note also?

A. Yes.

Q. Now, you executed a deed to him for your interest, did you?

A. Yes, I think so.

Q. Now, Mr. Rogers, isn't this the case; that the deed that was read to you on the 30th day of August, in Judge Hall's office, was a deed for this property, to the Title Guarantee and Abstract Company, as trustee?

A. Well, now, I couldn't say, I couldn't say how it was; no.

Q. Another question will perhaps help you to recall it; Wasn't it agreed at the time that the Title Guarantee and Abstract Company should act as trustee for each of the real parties in interest, including yourself, and issue to you a certificate of some kind, and to each of the others the same kind of a certificate, showing your respective interests in the land; Isn't that the fact?

A. That the Title Guarantee and Abstract Company issued to us certificates showing that it was due and coming to them?

Q. Showing they hold this land as trustee for you

and the other purchasers?

A. Oh, I don't think that was the way—no—I don't think it was; I am not so well versed in law and the way such things are done, to know how it was.

Q. You don't recall about that, then?

A. No, I don't.

Q. Mr. Clinkinbeard never made any pretense, or representation to you, did he, that this land had already been purchased by Sengstacken and Smith, or Clinkinbeard and Smith, or anybody else?

A. Oh, no.

Q. They never told you at that time that they were forming a syndicate to take the land over, and wanted you to come into the syndicate?

A. No, I don't think so; I didn't understand it that way.

Q. What he told you was this land could be purchased for a certain figure.

A. Yes.

Q. And he wanted you to take a certain interest in it?

A. Yes.

Q. And after he told you that, how long did you take to consider it?

A. Oh, I think a week or two, probably might have been two or three weeks.

Q. Then you considered it up to just a few days before you went to Hall's office and closed the deal, is that a fact?

A. Yes.

'Q. Now, at the time this deal was closed on the 30th of August there in Mr. Hall's office, you say you didn't know at that time that John F. Hall was getting an interest in it?

A. No.

Q. You didn't know that Hall and Hall were getting an interest in it under the deed?

A. No, I didn't.

'Q. Did you know whether he was getting an interest irrespective of the deed?

A. Hall and Hall you mean?

Q. Yes.

A. No.

Q. You didn't know that?

A. No.

Q. You men were paying him a commission for getting this land for you, were you not?

A. No, we supposed that this estate was paying him his commission.

Q. You didn't understand, then, that you people were paying him a commission?

A. No.

'Q. And you say it was about a month before you learned that Hall was getting an interest in the land?

A. Something near that, yes, a month.

Q. That was before you had paid the balance of the purchase price on the land was it that you found out Hall was getting an interest?

A. No, we paid before that—we paid at the time that the—yes, that was before—we paid that before

we knew that Hall and Hall was getting an interest.

Q. Now, as a matter of fact, at the time you purchased this land, you paid only one-half cash, and gave a mortgage for the other half of the purchase price?

A. Yes.

Q. Now, what I want to get at is this: Before you paid the other one-half of the purchase price, you knew that Hall and Hall were getting an interest in this land?

A. I think we did.

Q. Now, Mr. Rogers, you know where this land is located?

A. Yes.

Q. You did at the time?

A. Yes.

Q. You had been familiar with it for years?

A. Yes.

Whereupon said witness upon cross-examination, further testified as follows:

Q. East Marshfield joined this land on the north, did it not?

A. I think so, yes, joined East Marshfield on the north, I think it did.

Q. And it also joined it on the east, did it not? You can tell better perhaps by looking at the map.

A. Let me see, I am turned around sometimes in locations of east and west on the map; as I take it, this is East off here.

Q. Yes.

A. No.

Q. Yes.

A. As I take it that land lays in that—

Q. That is a fact isn't it that it joined it on two sides?

A. I think so.

Q. Did you know what lots were selling for over there in East Marshfield at that time?

A. They was not selling much, they were held there for sale.

Q. Now, Mr. Rogers, as a matter of fact, you are worth a great deal more than fifty thousand dollars, don't you think so?

A. Well, I don't know. That depends a good deal.

Q. Don't you know that your neighbors generally estimate you to be worth about \$250,000.00. Isn't that so?

A. I would like to be.

Q. Well, is that so?

A. Oh, no, I don't think so.

Q. You know a great many of your neighbors think so.

A. No, I don't think so.

Q. Do you know how long Mr. Sengstacken was going around to get persons to purchase this land?

A. Oh, I think some two or three weeks. I think it was.

Q. Do you know whether you were one of the first he approached?

A. I don't think I was.

Q. Now in the answer that you have put in this case, you have stated that Hall took that interest in lieu of a commission?

A. I didn't understand it that way.

Q. Your answer states that fact; you don't know anything about that do you?

A. I don't know anything about that, no, I would like to have that rectified if I misunderstood.

Whereupon said witness further testified upon cross-examination, as follows:

Q. Did you have the abstract of title to this property examined before you paid the money?

A. I supposed that Sengstacken looked after that part, and saw that it was all right.

Q. Did he tell you he had it examined before you paid your money?

A. I don't recollect that in particular. Yes, I understood it was all right.

Q. You understood it had been examined and was all right?

A. Yes.

(Deposition of Defendant, H. H. Rogers for defendants.)

Whereupon solicitors for defendants, read the deposition of H. H. Rogers, one of the defendants, herein taken, pursuant to notice, and stipulation of solicitors for complainant and defendants, at Marshfield, Oregon, on November 18-1912, who being first duly sworn according to law testified in substance as follows:

Direct Examination.

That he is 51 years of age, and resides on Coos River; that he has lived in that vicinity forty years, and is a son of S. C. Rogers.

Whereupon said witness further testified on direct examination as follows:

Q. State what you know about the sale of the Norman tract of land to Henry Sengstacken and others, through John F. Hall, attorney in fact, in 1905?

A. Sengstacken came to me and wanted me to go in and I agreed to take a share about the last time when we had to make the payment I considered I could do better with the money, and I dropped out. I didn't consider it a very good bargain.

Q. When, with reference to the day that you would pay the money was it that you agreed with Sengstacken to take an interest?

A. Well he talked to me about a week before I considered it.

Q. When, with reference to the day that you were to pay your money in, did you reconsider and refuse to proceed with your agreement?

A. I think that was the day—we would have had to pay the money in, in a few days. I had the money all ready; that was not the reason I backed out.

Q. Was that on the last day?

A. I think it was the last day the time of the contract would be out.

Q. It was on the day you were supposed to pay your money in that you told Mr. Sengstacken you

would not go ahead with the agreement?

A. Yes.

Q. Where did you tell Mr. Sengstacken that?

A. I think that was in the Owl Drug Store. He had an interest in that store at that time.

Q. Marshfield?

A. Yes, in Marshfield.

Whereupon said witness further testified upon cross-examination as follows:

Cross-examination.

Q. Mr. Rogers, had you made any payments at all on this?

A. No.

Q. Had paid nothing?

A. No.

Q. Do you remember the exact date when Sengstacken approached you?

A. No, not the exact date.

Q. Well, approximately?

A. Well, let's see that was in 1905 wasn't it?

Q. 1905 is the date.

A. Yes, that is right, I think.

Q. The actual transfer was made August 30th, 1905, Mr. Rogers; now, with reference to that time, when was it that Sengstacken first approached you?

A. You say the transaction was closed in August?

Q. Yes, August 30, 1905.

A. Well, I could not say definitely; it must have been. I could not say the time or the day. I don't

remember.

Q. Was it a week before that?

A. I would not say positive.

Q. But it was sometime in August?

A. Yes, sir, I think some time in August.

Q. On the day the transaction was to be closed and the money was to be paid, you notified Mr. Sengstacken that you would not go through with it?

A. Yes.

Q. You are a man of considerable wealth are you not?

A. No, not very much.

Q. Well, how much do you regard your wealth as in amount—what amount do you set it at?

A. Oh, I suppose five or six thousand dollars.

Q. That is very conservative isn't it?

A. A good deal of it is in real estate; I got some in real estate held to put a value on it.

Q. Now, at the time Mr. Sengstacken approached you, didn't he tell you it had already been purchased by somebody else?

A. I don't think so.

Q. What did he tell you; state exactly now all that you can recall.

A. Well, he thought it was a good deal; a fair deal; and of course, I didn't think so.

Q. What did he urge as his reasons for thinking it was a valuable piece of property?

A. He thought some day it would be of course worth something.

Q. Did he state to you why he thought so?

A. No, not in particular, no.

Q. You were acquainted with the property, were you?

A. Well, I never was all over it; no—of course you can't see it from the water front—a good deal of the property.

Whereupon witness further testified on cross-examination as follows:

Q. Now at the time that Mr. Sengstacken approached you in regard to this land, who did he tell you were going to be joint purchasers with you and him?

A. I understood my father was going in, and Mr. Clinkinbeard, and Wren Smith, and Mr. Rood.

Q. Did he tell you that Mr. Hall was to take an interest?

A. No, nothing was ever said about Mr. Hall.

Q. But you did tell that on the day the deal was closed that you would not take your interest?

A. Yes, sir.

Q. And you knew Mr. Hall took your interest?

A. No, I did not.

Q. You were not present?

A. No.

Q. You were not present I mean, when the deal was closed?

A. No, sir.

Q. How long afterwards was it you heard that Mr. Hall had taken your interest, or an interest in the

land?

A. I don't know as I ever heard anything about it at that time; after I dropped it, I didn't take any more interest in it.

(Deposition of Defendant, Z. T. Siglin, for defendants.)

Whereupon solicitors for defendants read the deposition of Z. T. Siglin one of the defendants, herein taken pursuant to notice and stipulation of solicitors for complainant and defendants, at Marshfield, Oregon, on November 18th, 1912, who being first duly sworn according to law, testified in substance as follows:

Direct Examination.

That he is 61 years of age, and resides in Marshfield; that he has lived in that vicinity since 1871; that he has held the positions of county treasurer and sheriff of Coos county; that he bought an interest in the Norman tract from Henry Sengstacken, or the Title Guarantee and Abstract Company; that he is not certain as to the previous ownership; that he purchased a $\frac{1}{2}$ interest in this tract about 1909; that at the time he purchased this interest he had no knowledge that John F. Hall or Hall and Hall had received an interest in the Norman tract under deed dated August 31, 1905, from Dora Herrmann and Christian Herrmann, by John F. Hall their Attorney in Fact, to the Title Guarantee and Abstract Company, Trustee, nor did he have any knowledge or

notice that John F. Hall or Hall and Hall had ever owned any interest in the Norman tract; that at the time he purchased his interest, defendant Henry Sengstacken, and L. D. Smith were his co-owners, and that they were, as far as he knows, the owners of the whole property; that in 1905 he was pretty well acquainted with the conditions and valuations of property in and about Marshfield and was buying and selling to some extent at or about that time and was financially able to buy at that time; that he knows the land involved in this litigation, and that in 1905 Mr. Sengstacken solicited him to take an interest in the purchase of these lands at a price, he thinks, of \$15.00 an acre, but that he refused to invest for the reason that he did not consider it a good speculation at that time, and he did not consider that \$15.00 an acre for the lands involved, in the summer of 1905, was a "good buy."

Whereupon said witness on cross-examination by solicitors for complainant, testified as follows:

Cross-examination.

That when he bought his interest in the Norman tract he was not positive who the other owners were; that he understood that it was Sengstacken and Smith; that he did not know whether Hall had an interest in it or not; that he made no investigation to find out who owned the property; that he thought that the Title Guarantee and Abstract Company was holding the title to this property as trustee, when he

bought his interest; that he thinks he bought his interest in 1909; that he thinks he got an assignment of the certificate from the Title Guarantee and Abstract Company, showing his interest; that he is not a stockholder in the Title Guarantee and Abstract Company; that he has an interest in the Eastside Land Company; that he knew defendant John F. Hall for years before he bought an interest in the Norman tract, and he knew that defendant, John F. Hall, had been attorney for Dora Herrmann in different cases; that he had heard that defendant, John F. Hall, had executed a deed conveying the Norman tract to the Title Guarantee and Abstract Company, in 1905, that he knew defendant, John F. Hall, was administrator of the Estate of Dora Herrmann; that he refused to purchase said land in 1905 at \$15.00 an acre, but that later, probably in 1909, he did consider that \$75.00 an acre was a fair investment in said lands; that several tracts of land were sold in and about Marshfield for about the same value as the lands involved, in 1905, for \$15.00 an acre and less; that there was no particular boom in real estate values upon the announcement of the building of the Drain road for the reason that there had been many railroad booms in Coos County and people had lost confidence in railroad announcements; that the actual building of said road increased values to some extent but not with the old residents, who had seen railroad booms before; that the coming of the C. A. Smith Company into Coos County enhanced the val-

ues very much and they began building in 1906.

(Deposition of Defendant, J. J. Clinkinbeard for Defendants.)

Whereupon solicitors for defendants, read the deposition of J. J. Clinkinbeard, one of the defendants, herein taken, pursuant to notice and stipulation of solicitors for complainant and defendants, at Marshfield, Oregon, on November 18-1912, who being first duly sworn according to law, testified in substance as follows:

Direct Examination.

Q. State your name, age, and residence?

A. J. J. Clinkinbeard; age sixty; my post office address is Marshfield. I live on Coos River.

Q. How long have you lived in this vicinity?

A. Since June, eighteen seventy-five.

Q. State what you know with reference to the purchase of the Norman tract from Dora and Christian Herrmann, through John F. Hall, attorney in fact, in 1905?

A. Well, I was approached by Mr. L. D. Smith, I think, and he asked me to take a share in that property, and after I considered it a while, I decided to do so, and did.

Q. How much of an interest did you take?

A. I took I think 1|12 interest.

Q. Are you sure about that?

A. No, I am not quite sure; I don't know how many took what they called a share; I wouldn't be

positive.

Q. Do you know how much you paid for it; perhaps that will help you to fix it.

A. No, I don't remember the exact amount; I think though, the way I apportioned it, it was something over forty acres my interest at fifteen dollars an acre; I ain't sure; 42 or 46; don't remember the exact amount.

Q. Well, if there were two hundred eighty acres in the tract, that would make your interest about two-twelfths.

A. I guess that is what it was, two-twelfths.

Q. Where and when did you agree with Mr. Smith that you would take this two-twelfths interest?

A. I ain't right positive; it was either here in Marshfield, or near that tract of land.

Q. Did you go on the tract and look it over at the time?

A. I didn't go and walk over the tract; but I did see a portion of the boundary.

Q. How long before the time that you had paid your money was it that you agreed to take this two-twelfths interest?

A. I could not say that; a very few days before; it might have been three days and it might have been ten days. I don't remember.

Q. Now, when you finally paid your money in, state the circumstances surrounding the paying of the money for your share?

A. The money was all to become due on a cer-

tain day; I would not attempt to testify to the day; the day the money was to become due Mr. S. C. Rogers and myself went into the office of Judge Hall, and we each made out a check for one-half of the amount that we was to pay for the land, and we called for the papers, deeds, etc., which we looked over, and after we had done so, we paid our proportion; I disremember the exact amount, but one-half of the purchase price of the land.

Q. One-half of your part of the purchase price?

A. Mr. Rogers paid his proportion at the same time; we paid this money to Judge Hall.

Q. Did you see the deed to the property at that time?

A. Yes, sir. Mr. Rogers and me looked it over.

Q. Was it then signed and executed by Mr. Hall?

A. We considered it properly signed; we were satisfied with it.

Q. At that time, who were the other parties whom you understood were to take an interest in this purchase?

A. There was Mr. Henry Sengstacken and Mr. L. D. Smith, in fact, they were the ones that were soliciting subscribers for the funds to buy this property, and D. L. Rood, H. H. Rogers, and S. C. Rogers and myself is all that I can call to mind at this moment.

Q. At the time you made the purchase and paid your money in to John F. Hall, did you have any knowledge or notice that John F. Hall or Hall and

Hall were to acquire any interest in the Norman tract, by virtue of that transaction?

A. No, I didn't.

Q. How long afterwards was it before you first discovered that John F. Hall, or Hall and Hall had acquired any interest in the Norman tract?

A. I could not say about that, it was sometime afterward, I don't know, it might have been a month, and it might have been six months, I don't remember the time.

Q. At the time you paid your money in, had you any suspicion or intimation that John F. Hall, or Hall and Hall were to obtain any interest in the Norman tract by virtue of that sale?

A. No, sir, I did not.

Q. At that time had any other persons than the persons you have mentioned, been suggested as purchasers under this deed, by either Mr. Sengstacken or Mr. Smith?

A. Not that I remember.

Q. How much later did you sell your interest?

A. I don't remember, I suppose a year and a half, or such matter after we bought the property.

Q. To whom did you sell it to?

A. L. D. Smith.

Whereupon said witness testified on cross-examination by solicitors for complainant as follows:

Cross-examination.

Q. Mr. Clinkinbeard, what did Mr. Smith say to

you about this land when he approached you?

A. I don't remember; he asked me if I would like to go in with him.

Q. Did he tell you who the owner was?

A. Yes, sir.

Q. What did he say about that?

A. He said he was anxious to sell the property and that it had been offered at fifteen dollars an acre.

Q. Did he tell you where the owner lived?

A. I knew where she lived.

Q. Where did she live?

A. She was in Germany at that time.

Q. You had known that she had been there since 1900?

A. I don't remember when she went there. I had been acquainted with her a great many years. Knew her when I first came here in 1875.

Q. You knew this land here during all that time?

A. Yes, sir, I could see it; it was in sight of town, in fact, I had been over the land years ago.

Q. You knew that John F. Hall was her agent?

A. I heard he was.

Q. You knew that at the time?

A. Yes, sir.

Q. Who was the grantee in the deed that you and Mr. Rogers looked over that day when you paid your money?

A. I think it was Christian Herrmann and wife.

Q. The grantee; the party to whom it was sold?

A. Oh, Mr. Smith and Mr. Sengstacken.

Q. Your names were in the deed?

A. I don't remember if my name was in it. Think the title Guarantee and Abstract Company was.

Q. As a matter of fact, was it not conveyed to the Title Guarantee and Abstract Company rather than any of you purchasers?

A. I think it was.

Q. What did you receive at that time as an evidence that you had purchased an interest in this land?

A. I received a paper of some description.

Q. Signed by whom?

A. I disremember, but I think the Title Guarantee and Abstract Company.

Q. By its officers?

A. Yes, sir.

Q. Where is that certificate?

A. I have no idea; think I surrendered it when I sold my interest in it.

Q. You had lived here you say since seventy-five?

A. Yes, sir.

Q. And during all of that time you have known John F. Hall?

A. I might say all the time.

Q. And practically during all of that time you have known Mr. Sengstacken?

A. Yes, sir.

Q. How long had you known Mr. L. D. Smith?

A. About the same length of time; in fact, I knew him I guess before that time. Had seen him and knew his father and his brothers.

Q. In 1905 you were possessed of some considerable property?

A. Well, some yes.

Q. How much were you worth at that time?

A. I could not tell you.

Q. Well, give a rough estimate?

A. Well, I have quite a farm, for this country, but little else besides my place.

Q. You were worth anywhere from twenty-five thousand to fifty thousand dollars in 1905 were you not?

A. I could not tell you about that.

Q. What is your own judgment about it?

A. Well, at the present time, the way farm lands are selling, suppose twenty-five or thirty, possibly forty, if I could sell land in the same proportion some other places have sold for.

Whereupon said witness further testified on cross-examination as follows:

Q. In a very short time, only a few days after Smith approached you, you agreed to take your interest, and went into Judge Hall's office to pay the money, is that true?

A. Yes, sir.

Q. And you paid by check?

A. I would not say for certain. Yes, I know I did. I generally pay money that way.

Q. Have you that cancelled check?

A. I probably have.

Q. Can you produce it?

A. Probably, if I was at home I could.

Q. Will you look it up and bring it in, if you have it?

A. Well, it depends on how soon you want it.

Q. Well, any time between now and Thursday morning will do.

A. I will try, sir. I will not go home until to-morrow afternoon.

Q. You have testified, Mr. Clinkinbeard, that at the time you paid your money, you did not know that John F. Hall was going to take an interest in this land?

A. Yes, sir.

Q. When did you sell your interest to L. D. Smith?

A. I could not tell you the date, but something like a year and a half, I think after we bought the land.

Q. What did you get for it?

A. I sold it for sixty dollars an acre.

Q. Now, as a matter of fact, Mr. Clinkinbeard, didn't you know at the time you paid your money to Hall that the following persons were really the purchasers of that land, namely, Henry Sengstacken, S. C. Rogers, L. D. Smith, D. L. Rood and John F. Hall?

A. I didn't know that John Hall had anything to do with it, only the selling of it.

Q. I hand you a paper, and ask you to state whether that is your signature signed to that?

A. It is.

Mr. McALLISTER: This is offered in evidence and we ask to have it marked "Plaintiff's Exhibit B" (which is hereto attached and made a part hereof) as part of the cross-examination of this witness.

Q. You swore to that before Mr. Reigard didn't you?

A. Well, I probably did.

Q. At the time you signed it?

A. I undoubtedly did.

Q. Now, at the time you paid your money for the interest, you knew that the Abstract Company was taking title to this land as trustee for the purchasers, didn't you?

A. Yes, sir.

Whereupon said witness being further interrogated on cross-examination, testified as follows:

That when he purchased an interest in the lands involved as a member of the syndicate in 1905 Mr. Smith told him that he thought it would be a good buy, but that witness regarded it as one of those pieces that "may be and may not;" that the railroad excitement in 1905 did not give him much confidence because when he came to Coos County in 1875 they were building railroads, and have almost every year.

Whereupon said witness on re-direct examination by solicitors for defendants, testified as follows:

Re-direct Examination.

Q. State the circumstances under which you signed this affidavit, being "Plaintiff's Exhibit E?"

A. I was asked into Mr. Reigard's office; I didn't know the man at the time, and he asked me some questions about that; asked me who was interested in it. I knew that John F. Hall was interested in it at that time; this occurred something like a year or so ago, and he asked me to name over the parties that was interested in that; and I named over those parties and included John F. Hall: I did not know just exactly what he was driving at, and I named over the parties I understood was interested at that time.

Q. Was it represented to you at that time that the purpose of this affidavit was to show that you had no claim in the property, and that Mr. Reigard wanted to clear the title of the property?

A. I think so, yes, sir.

Q. What representations were made by Mr. Reigard to you as to his purpose for wishing this affidavit?

A. I can not call to mind right now what they were.

Q. Well, what did he say that he wanted the affidavit for?

A. I understood, I think he was wishing to find out who were the owners and who were the original—that is who were the owners of that property.

Q. Did Mr. Reigard ask you for a quit claim deed at the same time he asked for this affidavit?

A. I don't think so, I had been asked by Herrmann, and his attorneys, both of them wrote to me asking for a quit claim deed, but I do not remember

Mr. Reigard asking for it. I don't remember if it was quit claim deed; I think one of them was for a warranty deed; it was a demand.

Q. With reference to the time that you paid in your money, when did you find out that John F. Hall was to acquire any interest in the Norman tract by virtue of that transaction?

A. Well, I could not tell you; it was—I heard that he had bought an interest in that sometime after that; it might have been a month, or it might have been a year; I don't remember but it was some time after I paid in that money.

Q. And this affidavit made on the 26th day of June, 1911, was made in view of the facts which you were then in possession of, and had learned since the time of the sale?

A. Yes, sir. As far as John Hall's name. Of course the others were interested in the deal the same time I was.

Whereupon said defendant on recross-examination, testified as follows:

Recross-examination.

Q. But as a matter of fact, the contents of that affidavit was true?

A. The intentions were true.

Q. And it is true, isn't it?

A. Well, yes, I think it is true.

Q. Mr. Clinkinbeard, as to the title of this land, on whom were you relying as to the title?

A. Well, this Mr. Sengstacken, and Mr. Smith were the ones that were making this deal, and they assured every one that the deeds would be perfect.

Q. And the title good?

A. Yes, and the title good.

Q. And you were relying on Sengstacken and Smith in respect to that?

A. Yes, sir.

Q. You yourself never examined or had the title examined?

A. No, sir; any more than in John F. Hall's office, we looked over the title, Mr. Rogers and me and it looked satisfactory.

Q. Did you look over the abstract?

A. We looked at the deed and think it was there but I don't know; we didn't go into the abstract any more than when we was in there we glanced over it.

Q. Did you read over the power of attorney to John F. Hall in connection with this transaction, to John F. Hall from Mrs. Herrmann?

A. I wouldn't be certain.

Q. But you knew as a matter of fact that he was the attorney in fact for Mrs. Herrmann?

A. I had heard he was. I understood it that way.

Q. You knew that he executed the deed, didn't you?

A. Yes.

Whereupon said witness, on re-direct examination testified as follows:

Re-redirect examination.

Q. At the time you made this purchase and paid the money, whom did you understand was taking the interest which it afterwards developed Hall and Hall took?

A. H. H. Rogers.

Whereupon said witness on re-re-cross examination, testified as follows.

Re-recross Examination.

Q. Had you signed any preliminary paper before you went into Hall's office and paid your money?

A. I don't remember.

Q. That is, did Mr. Smith present to you a paper for your signature agreeing you would take so much interest in the land?

A. I don't remember.

Q. You thought that was an open proposition?

A. I thought so.

Whereupon said witness on re-re-redirect examination by solicitors for defendants, testified as follows:

Re-re-redirect Examination.

Q. At the time Mr. Smith talked with you, whom did you understand you were dealing with in taking this respective interest?

A. Do you mean who did I buy it from?

Q. Yes, who owned the property at that time; what was the state of the title?

A. We understood that Mrs. Norman owned the property, and that John F. Hall was her power of attorney and had power to sell.

Q. Did Mr. Smith make any representations to you at that time on the question of whether he had purchased the property, or he and Mr. Sengstacken had purchased the property?

A. I don't remember right at this time, but my understanding was that they had bought it, or was aiming to buy it, and that they didn't have funds on hand to purchase it with, and they were soliciting others to take an interest in it, is the way I understood it, or as I remember it anyway.

(Deposition of Defendant, D. L. Rood for Defendants.)

Whereupon solicitors for defendants, read the deposition of D. L. Rood, one of the defendants, herein taken, pursuant to notice and stipulation of solicitors for complainant and defendants, at Marshfield, Oregon, on November 18-1912, who being first duly sworn according to law, testified in substance as follows:

Direct Examination.

Q. State your name, age, and residence?

A. My name is D. L. Rood, age sixty-three, residence, Marshfield.

Q. How long have you lived in Marshfield and vicinity?

Q. Thirty-one years and three months; four months I guess.

Q. Are you the D. L. Rood who, in 1905, was interested in the purchase of a tract of land known as the Norman tract from Christian Herrmann and Dora Herrmann, through John F. Hall, their attorney in fact?

A. Herrmann, not known by that name; yes, I am.

Q. State the circumstances under which you became interested in that purchase?

A. Why, Mr. Sengstacken and Wren Smith were the ones that I understood purchased the property, and they come to me and wanted to know if I wanted to go in on the ground floor with them, and I told them that I would.

Q. How much of an interest did you agree to take?

A. 1|12.

Q. Who were the other persons whom you understood at that time were interested in the purchase of this tract?

A. Why, S. C. Rogers, and J. J. Clinkinbeard, and the younger Rogers, Stephen's son, Herbert Rogers; I don't know as I remembar all that was in it.

Q. Did you understand that Mr. Sengstacken and Mr. Smith were retaining an interest also?

A. Yes, sir.

Q. Who did you pay your money in to?

A. Why, if I remember correctly, I paid mine over to Henry Sengstacken; I would not want to swear to that, but as near as my recollection is now, I paid it

over to him.

Q. Do you remember the date?

A. If I could find some old checks; I think it was in August. If I remember, I know I gave a check for it; I think it was in August, but I don't know, would not try to tell the date as far as that, but I think it was the month of August.

Q. At the time you paid your money in on the interest that you were purchasing, did you have any notice or knowledge of any other persons being interested in this purchase than the ones you have mentioned?

A. Why, they were all mentioned, but I have forgotten who they were; they were told to me, but really I have forgotten who they were.

Q. Did you have any knowledge at the time you paid this money in that John F. Hall, or the firm of Hall and Hall were interested in any way in this purchase?

A. Not as purchasers; I understood Hall was the agent, or something like that for it.

Q. Did you have any suspicion or intimation that John F. Hall, or Hall and Hall were going to acquire any interest in this property?

A. No, sir.

Q. When was it that you first learned that Hall and Hall, or John F. Hall, had acquired any interest in the property?

A. Why, I think they told me this up in their office some time after that; I could not say how long.

I think, if I remember, Tom, is, we call him, that they had an interest in it.

Q. At the time of the sale, whom did you understand had agreed to take the interest which afterwards developed that Hall and Hall had taken?

A. Young Rogers I understood backed out; that is, Herbert Rogers.

Whereupon said witness further testified in substance as follows:

That he had been buying real-estate on Coos Bay for thirty-one years; that every time he got a dollar ahead he bought a lot and that in 1905 at the time of the purchase of the Norman tract by himself and associates, they talked it over and considered that they were paying all it was worth at that time.

Whereupon said witness, on cross-examination by solicitors for complainant, testified as follows:

Cross-examination.

Q. How long after Mr. Sengstacken and Mr. Smith spoke to you was it before you went and paid your money to Hall?

A. I am not positive I paid my money to Hall. Would not want to swear whether I paid it to Hall or Sengstacken.

Q. Well,—paid to Sengstacken, then?

A. Why, I don't think it was many days. It was a few days.

Q. At that time you said you heard that Sengstacken and Smith had bought it, or agreed to buy it?

A. Yes.

Q. Which was it, that they had bought it, or agreed to buy it?

A. That they had bought it.

Q. When did you understand they had bought it?

A. At the time when they spoke to me about coming in.

Q. That is they had just bought it?

A. I would not say. I did not inquire right down to find when they bought it.

Q. What understanding did you get as to when they bought it?

A. I didn't have any understanding when they bought it.

Q. Did you have any understanding that they had bought it, or had agreed to buy it?

A. My understanding was they had already bought it.

Q. You knew that Mr. Sengstacken was a very wealthy man didn't you?

A. By some he was called that.

Q. Well, you really knew yourself that he was worth a great deal of money?

A. I knew by general talk that he had a good deal of property, and would be worth a good deal of money.

Q. And you knew that Mr. Smith was worth a great deal of money?

A. No, I did not.

Q. You didn't know that Mr. Smith was worth a

good deal?

A. I knew that he had a little farm and some money.

Q. Now you knew how this land was to be paid for, didn't you?

A. I don't know whether I did or not; we paid so much down, and—

Q. How much were you to pay cash, the whole of you, all of you?

A. For the whole tract what was each of us to pay?

Q. What was the total amount of cash that all of you were to pay down on the purchase price of the land?

A. My share was \$183.00, and a third, if I remember.

Q. Have you much of an interest?

A. 1|12; that was what was to be paid down then.

Q. And there were how many of you in this transaction then?

A. Supposed to be twelve.

Q. Supposed to be twelve?

A. Yes, sir.

Q. Who were the other men to make up the twelve?

A. I don't know as I remember; as I have said, there was Mr. Sengstacken and Mr. Smith, Clinkinbeard, S. C. Rogers, and Herbert Rogers.

Q. You say you didn't know about Hall and his brother taking an interest?

A. No, sir.

Q. You are sure of that; there was no mention made of the fact?

A. No, sir.

Q. Did you have any intimation or suspicion that they were getting an interest in it?

A. No, sir.

Q. Did you see the deed that was made out for this land?

A. Did not.

Q. What did you get to evidence your interest in the land?

A. I got a receipt.

Q. What kind of a receipt was it?

A. Well, now it was just a receipt showing that I had paid so much in.

Q. And that you were entitled to such an interest in the land?

A. Yes.

Q. Who was that signed by?

A. I could not swear to that, but I think it was Mr. Sengstacken.

Q. Wasn't it signed by the Title Guarantee and Abstract Company, through its officers and agents?

A. I would not swear; I think I have the receipt somewhere.

Q. Can you find it?

A. I don't know whether I can or not.

Q. I wish you would look for it and bring it down here tomorrow. I would like to have it in the rec-

ord.

A. I will try.

Whereupon said witness further testified on cross-examination as follows:

Q. When did you first learn that Mr. Hall had an interest in this land?

A. Well, I would not want to say just the month, some little time after I had gotten my share.

Q. Well, was it a month, or a month and a half?

A. Well, it might have been—two or three months, I would not say.

Q. But it was before you had paid the balance of the purchase price on this land, wasn't it?

A. I didn't have anything to do with the paying of the balance.

Q. That was paid out of the proceeds from the sale of lots platted out of the land, wasn't it?

A. I don't know, sir, whether it was or not.

Q. You never paid any more cash on it, did you?

A. No, sir.

Q. And none of the rest, did they?

A. No, not so far; I would not swear to that.

Q. But a note and mortgage was given by the Title Guarantee and Abstract Company for one-half of the purchase price, wasn't it?

A. I could not say as to that.

Q. Didn't you understand that was the arrangement?

A. That was my understanding, yes sir.

Q. Do you still own your interest in this land?

A. No, sir.

Q. When did you sell out?

A. I think it was in 1906.

Q. What date in 1906?

A. November or December, one of those months.

Q. What did you get for your interest that you sold?

A. Sixty dollars an acre.

Q. And to whom did you sell it,—Smith?

A. No, Sengstacken.

Q. Were you ever a stockholder, or interested in the Title Guarantee and Abstract Company?

A. No, sir.

Q. Or in the Eastside Land Co.?

A. No, sir, was not.

Q. You paid \$183.00 and a third for a twelfth interest in this land, you say?

A. \$183.33-1/3, yes, sir.

Q. That is all.

(Deposition of Defendant, James T. Hall for Defendants.)

Whereupon solicitors for defendants, read the deposition of James T. Hall, one of the defendants, herein taken, pursuant to notice and stipulation of solicitors for complainant and defendants, at Marshfield, Oregon, on November 18-1912, who being first duly sworn according to law, testified in substance as follows:

Direct Examination.

Q. State your name, age, and residence?

A. James T. Hall, 53, residence, Marshfield, Oregon.

Q. How long have you lived in Marshfield, Oregon?

A. About forty years.

Q. Are you one of the members of the firm of Hall and Hall, attorneys at law, and sometimes dealing in real estate?

A. I am, yes.

Q. The other member of that firm is John F. Hall?

A. Yes.

Q. Acting as real estate agents, did the firm of Hall and Hall ever have the tract of land which is known in this case as the Norman tract, for sale?

A. It did.

Q. I will show you the outlines of the same on Plaintiff's Exhibit "A;" 280 acres here in Sections 26 and 35—13; did your firm have this land for sale?

A. We did.

Q. When?

A. Oh, I can't remember exactly; we had it for quite a few years for sale; now to tell you the exact year, I couldn't tell; the record would show that, of course; it was after 1902 I am sure; 1902 or 1903, but I don't recollect the exact year; and I don't want to say positive.

Q. What effort did you make to dispose of and sell this property?

A. I suppose that I had taken different people over

there to look at this property probably a dozen or more times to try and make a deal of it, but at that time property was considered a kind of a drug in the market; and there was very little sale for acreage property consequently hard to get anybody interested in buying real estate, particularly out of town lots, particularly in acreage property; we did everything to try and get a sale of that property because Mrs. Norman wanted us to dispose of it and sell it.

Q. Did you list the same as you did the other lands, which you carried for sale?

A. We did.

Q. Did you, or your brother, negotiate the sale which finally resulted in the conveyance of this property?

A. I think I know we talked it over together a number of times; I really think my brother made the final negotiations of the sale with Sengstacken and Smith.

Q. Did you ever have any negotiations with Smith and Sengstacken yourself?

A. I don't think I did; think that negotiations were direct with my brother.

Q. Did you ever have any negotiations with any syndicate that Smith and Sengstacken may have formed to take over that purchase?

A. We might possibly have had after the deal was made to Sengstacken and Smith, but not prior thereto.

Q. I am asking you if you personally, not what

the firm did, if you personally, had any negotiations representing the partnership?

A. I did, yes.

Q. What negotiations did you have in connection with the sale of the property?

A. It has been so long ago I can't recollect just all the transactions that was there, but as near as my recollection is concerned, after Smith, or Sengstacken and Smith bought this property, and entered into a deal that was for the purchase price of the property, they formed a kind of a syndicate and took in different people on the bay in that they in order to raise the money to make the final payment; there was one party that was figuring on taking a certain interest that failed to come through, and so I went in with them, and virtually myself took this interest in the property; at the advice of my brother I took this interest in that property.

Q. Whose interest was this, who was it that failed?

A. I think it was Herbert Rogers, that is my recollection.

Q. How was that interest taken, in the name of Hall?

A. In the name of Hall and Hall, or John F. Hall and James T. Hall.

Q. At whose suggestion did the firm of Hall and Hall take this interest?

A. Well, it was my brother's suggestion.

Q. State the circumstances under which he made

the suggestion.

A. The deal was about to fail, and they had attempted to raise the money to pay up, but money was tight at the time and they could not raise it hardly, without going out of the members in that they was making a kind of a syndicate of it; and we had a certain interest in the property as a matter of commission; so when Mr. Rogers, I think it was Herbert Rogers, failed to come through, I talked the matter over with my brother, and said that while Sengstacken and Smith had bought this property, and the deal is going to fail, unless we can put it through some way, and if you say so, I will take it and take chances on it, so I took it in his name and my own; but that was after the sale was made to Sengstacken and Smith.

Q. At the time you made the price to Sengstacken and Smith or to any syndicate that was formed by them, did you have any idea of participating in the sale yourselves?

A. We did not; it was an after consideration entirely.

Whereupon said witness further testified on direct examination, in substance as follows:

That during the past thirteen years he had been actively engaged in the real estate business in Marshfield and vicinity, and that in the summer of 1905 at the time of the transfer of the Norman tract he considered \$15.00 an acre a fair price for the same, and that about that time he could have bought the whole

Norman tract for \$3500.00.

Whereupon said witness, on cross-examination, further testified as follows:

Cross-examination.

Q. Now, you said in your direct examination, Mr. Hall, that the deal was about to fail and they had been unable to get the money together, what did you mean by that?

A. That they could not raise enough to meet the first payment, or the second payment, will not be sure.

Q. The first payment was to be one-half of the purchase price?

A. Yes, that is my recollection.

Q. And the other half of the purchase price was to be taken care of by a note and mortgage back on the land?

A. Yes, sir.

Q. And the note was to run for a year, wasn't it?

A. Well, now that is my recollection; I wouldn't be positive, but I think that was it.

Q. You knew that Mr. Sengstacken and have known him for years?

A. Yes.

Q. And you knew Mr. Rood?

A. Yes.

Q. And Mr. Rogers?

A. Yes.

Q. And his son?

A. Yes.

Q. And you knew they were all men well to do?

A. Yes, that is, all of them men that had considerable property in Coos County.

Q. Now, when you say that Sengstacken and Smith that they had bought it from your brother, you mean they had agreed to buy it?

A. They had absolutely entered into an agreement to buy the property, and to take it.

Q. Was that agreement in writing?

A. I think it was; but I am not positive.

Q. Do you know where that written agreement is?

A. I could not tell you. It was in the office somewhere, the chances are Mr. Sengstacken has it.

Q. Would it be in your office?

A. I don't think so. I think Mr. Sengstacken has it now.

Q. Will you look through the files in your office, and see if you can find it?

A. I might.

Q. Bring it tomorrow, or a copy if you cannot find the contract itself.

Q. Do you remember the date of that?

A. No, I do not.

Q. You stated in your examination in chief that you never had any conversation with either Mr. Sengstacken or Mr. Smith about it?

A. For the purchasing of the property, no, that was with my brother.

Q. Were you ever present when he was talking with them?

A. I have heard little conversations that took place in our office, but just what they were, I didn't tax my mind, didn't pay much attention.

Q. When was it that you understood they bought it?

A. Well, I understood that, when they were negotiating with my brother at the time they had bought the property, that was Sengstacken and Smith.

Q. When was that, Mr. Hall?

A. About the time you mentioned, somewhere along about that time.

Q. How long before the money was paid in was it?

A. Well, now, I couldn't tell you that at all because the money was paid in to John Hall individually and never went through my hands, and I couldn't tell exactly when it was paid, nor how much at a time.

Q. The money was paid Mr. Hall on the 30th of August, and the deed seems to have been made on that date to the Title Guarantee and Abstract Company; how long before that date was it that you understood that Sengstacken and Smith had bought the property?

A. Well, I understood they had bought the property from the time they were negotiating with my brother for it.

Q. When was that?

A. I would not attempt to mention the date; I kind of have an idea, but I am not positive whether I took the acknowledgement on the date or not; would not be positive.

Q. You mean the deed to the Abstract Company?

A. Yes.

Q. And that is the only deed made?

A. Yes, except the mortgage.

Q. Now, you said that the deal was about to fail; you mean that the sale of the land was about to fail?

A. They had to raise so much money by a certain time.

Q. And when it was about to fail you suggested to your brother that you take an interest?

A. That was by reason of one of the parties whom they had taken in, after they organized this syndicate, and it was then that I suggested that we would take that other interest.

Q. And that was about the time that the money was being paid in there?

A. Somewhere, yes.

Q. And before the deed was executed?

A. I wouldn't be positive to that; but I think the deed was executed before.

Q. About that time?

A. Yes.

Q. At any rate, it was before the deed was delivered to them that Herbert Rogers notified them that he wouldn't come through.

A. I won't be positive about that, whether it was before or after.

Q. As soon as he notified you that he was not going to take his interest is when you suggested to your brother that you take it?

A. That is when I suggested it, yes.

Q. And if you had not taken that interest, the deal would not have gone through, would it?

A. Oh, I don't know about that; there was a good many other people here that probably would have taken it, in fact I know they would; in fact, I am satisfied in my own mind that the deal would not have failed even if they was a little slow in coming through with their payments; but it would have been delayed a little, not long of course, you could not tell.

Q. You took your interest then for the purpose of closing it up as soon as possible?

A. Well, we wanted to get the deal closed of course, for the reason that the Herrmanns was after us all the time for money; they wanted money all the time and in other deals and other places, in which we were dealing with them, they were after money, money, money, why don't you send us some money; if you sold this piece or that piece; send us some money, and that was the reason that we were trying to close it up, in order that we might send them the money they wanted on the premises.

Q. And at the time then this was closed up with the syndicate and the deed was delivered, you took your interest for you and your brother?

A. Yes, we didn't take no interest in particular in our own name; it was simply a kind of an understanding that the Title Guarantee and Abstract Company should hold the deed, and I am not sure but they hold it today.

Q. But at the time the deed was delivered, on the 30th day of August, if that was the date when affair was closed up, and these parties paid their money, you at that time took the interest for yourself and brother, and the Title Guarantee and Abstract Co. took the title for the benefit of all of you?

A. My recollection is that the deed was executed and drawn up prior to that time.

Q. Yes, I think it was; but at the time of its delivery, you agreed to take your interest?

A. I would not be positive whether it was at the time of the delivery or not. I would not want to go on record as saying that.

Q. In any event you do remember it was at the time that Herbert Rogers refused to go ahead and put in his money?

A. It was along about that time, that we understood; we didn't know at the time who was in this syndicate, except Sengstacken and Smith, Stephen Rogers, I should think, and John Clinkinbeard, but now whether or not I would not say positive that that was the case, but it might have been.

Q. You said in your evidence in chief that they had attempted to raise the money and had failed?

A. That was my understanding.

Q. And because they had failed, you took your interest, is that it?

A. Well, not particularly, because they had failed to raise the money; but there was an opening there, and for fear the other might be a possible failure, I took the interest.

Q. And it was to prevent the deal falling through that you took it?

A. Yes, to a certain extent.

Q. Now, Mr. Hall, you kept account of this transaction in your office, didn't you?

A. Yes, we have got an account there somewhere; my brother has I know; I never kept them.

Q. You are familiar with them, aren't you?

A. I was at the time.

Q. You can make yourself familiar with them now by going over them?

A. I might.

(Deposition of John Yoakam, for defendants.)

Whereupon solicitors for defendants, read the deposition of John Yoakam, taken pursuant to notice and stipulation of solicitors for complainant and defendant, at Marshfield, Oregon, on November 18, 1912, who being first duly sworn, according to law, testified as follows:

Direct Examination.

Q. Are you acquainted with L. D. Smith?

A. Yes, sir.

Q. Did you know of the time when this tract was

transferred from Dora and Christian Herrmann to Smith, Sengstacken and others?

A. Well, before the deal was made, Smith asked me to take a one-quarter interest in it; he told me it could be bought for four thousand dollars, and I refused to take a fourth interest; I afterwards met Mr. Smith and he told me that Mr. Clinkinbeard had taken the fourth interest and the deal was made.

And said witness further testified, in substance, as follows:

That he was engaged in logging in 1903 and 1904 and logged off the Norman tract for the second time, and that he hauled everything from the tract which he considered merchantable timber at that time.

(Deposition of W. U. Douglas, for Defendants.)

Whereupon solicitors for defendants read the deposition of W. U. Douglas, taken pursuant to notice and stipulation of solicitors for complainant and defendants, at Marshfield, Oregon, on November 18, 1912, who being first duly sworn according to law, testified as follows:

Direct Examination.

That he was an attorney-at-law, aged forty-four, residing at Marshfield, Oregon, and had lived in that vicinity since 1890; was a director of and attorney for the First National Bank at Marshfield, was President of the Coos Bay Home Telephone Co., and since first coming to Marshfield up to the present time had been handling real estate more or less, buying and

selling for others and on his own account; that he has been acquainted with the Norman tract ever since coming to Marshfield and that the reasonable market value per acre of that tract in the summer of 1905 would not be over ten or twelve dollars per acre; that it is very difficult to estimate the market value at that time for the reason that the land had no value for agricultural purposes, had been logged off twice to the knowledge of the witness, was rough and hilly, and that part which could have been successfully cultivated was covered with stumps and fallen timber so that it had no value for grazing or agricultural purposes, and in 1905 it had no value for speculative purposes because there was no market for it outside of a possible speculative value; that at the time of the sale of the Norman tract to Sengstacken and Smith, he knew of the same, but as to the exact time of the sale or who the parties were in interest he does not know.

Whereupon said witness on cross-examination further testified as follows:

Cross-examination.

That he knew of several pieces of land, designating them in detail, in and about Marshfield which in 1904 and 1905 sold for approximately the same or less relative consideration than was sold the Norman tract to Sengstacken and Smith; that in 1905 there was no activity in real estate on the East Side of Coos Bay but that the activity in real estate was on the west

side between Marshfield and North Bend; that he is not basing his values in 1905 on the value of said land for farming or timber purposes for it had no value for such purpose, nor does he take into consideration the value of said tract for wharfage, shipping facilities and warehouses, for the reason that in 1905 there was no demand for anything of that character which would make any value; that the announcement of building the Drain line of railroad had a tendency to stimulate things, but there was no actual movement in real estate for several months thereafter, except possibly inside property in Marshfield or North Bend.

(Deposition of John S. Coke, for Defendants.)

Whereupon solicitors for defendants read the deposition of John S. Coke, taken pursuant to notice and stipulation of solicitors for complainant and defendants, at Marshfield, Oregon, on November 18th, 1912, who being first duly sworn according to law testified in substance as follows:

Direct Examination.

That his name is John S. Coke, age forty-five, residence Marshfield, Coos County, Oregon; that he is one of the Circuit Judges of the Second Judicial District of the State of Oregon; that he is a stockholder in the First National Bank of Coos Bay at Marshfield, and of the Bank of Oregon at North Bend, and a director of the First National Bank of Coos Bay; that he has lived in Marshfield twenty-four years and has been engaged in the practice of law from 1893 until his appointment as Circuit Judge in 1909, and

during his practice in connection with the banking business he had a great deal to do with real estate transactions in the vicinity of Marshfield; that he engaged in the banking business in 1903, and that he thinks he has had practically as much to do with real estate transactions in Marshfield and vicinity as any other one individual; that in 1903 he organized the First National Bank and was president and attorney from the time of organization until 1907 when he organized the First Trust & Savings Banks and thereafter the stockholders of the First Trust & Savings Bank purchased the First National Bank; that there was no real estate activity in the vicinity of Marshfield until 1890 when Mr. Graham started to build a railroad from Marshfield to Myrtle Point, which railroad was proposed to extend to Roseburg, and the construction of such railroad increased real estate valuations and after the cessation all real estate valuations fell very greatly and there was no further marked increase in real estate values until the purchase of the stock and property of the Coos Bay Roseburg & Eastern Railroad Navigation Company by the Southern Pacific Company, which sale was consummated on July 1, 1906, and after that time there was a movement in real estate beginning in the fall of 1906, that in December, 1906, the C. A. Smith people purchased the properties of E. B. Dean & Company in Marshfield and took possession of the same in 1907 and began construction of their improvements in 1907; that he was the attorney for E. B. Dean and

Company up to the time of said sale and thereafter was the attorney for the C. A. Smith Company; that the public had absolutely no knowledge of the purchase by the Smith interests until the sale was actually made; that he was the attorney of J. D. Spreckles & Brothers Company in taking possession of the Coos Bay Roseburg & Eastern Railroad & Navigation Company in 1899 and continued to represent them and the railroad company up to the time of the transfer to the Southern Pacific Company in July 1906; that he is positive of the date of the transfer to the Southern Pacific Company to the local railroad interests by reason of having been attorney for both of said interests, and further from the fact that the earthquake and fire in San Francisco on April 18th, 1906, deferred temporarily the negotiations of such sale which was thereafter consummated in July 1906; that he does not recall the date of the announcement and of the actual construction of the Drain railroad, but he does remember "positively and distinctly" that there was no particular stir in real estate values until after the transfer of the property of the local railroad to the Southern Pacific in July, 1906, and that then the increase in values did not commence immediately, for there had been so many announcements of the building of railroads into Coos Bay that people were indifferent with regard to them; that in 1906 he made several purchases of real estate for himself and together with Mr. W. S. Chandler, and at the time of making such purchases in 1906 there had been

no increase in real estate values in or about Marshfield; that from 1900 to January 1st, 1906, there may have been some few sales and probably a gradual increase in valuations, but there was no marked increase in valuations until the summer and fall of 1906; that prior to 1906 the town of Marshfield for many years had been in an unimproved condition, no street pavements and no buildings of the better class constructed until 1907; that prior to 1906 there was no activity south of Marshfield and along Isthmus Slough; that he is acquainted with the Norman tract and knew of the sale in 1905 to Sengstacken and others; that he knew of said sale after it was made and knew of the negotiations being made for the transfer prior to such sale and was solicited to take an interest in the property at the time of said sale but does not remember exactly the price, although somewhere in the neighborhood of \$4000.00 or \$4500.00; that he distinctly remembers that someone suggested to him that he take an interest in this property at that time and that he considered it then and declined to take such interest because he did not think it was any particular bargain at the price offered, and that he would have taken an interest if he had thought it particularly attractive, as he was at that time in the market for the purchase of good investments in real estate; that he regards that the price paid by Sengstacken and Smith in 1905 as a fair price at that time.

And said witness on cross-examination further testified in substance as follows:

Cross-examination.

That he was basing his estimate of the value of the Norman tract in 1905 upon what he deemed to be its true value for any purpose, and that at that time there was no demand for that kind of property so situated for townsite purposes; that he does not remember the exact time of the announcement of the building of the Drain road, but that he is "very positive" that there was no particular faith placed by people here (Marshfield) in the building of the railroad, neither was there any particular increase in value due to that or any other cause until after the purchase of the local railroad by the Southern Pacific in July 1906.

(Deposition of James H. Flanagan, for defendants.)

Whereupon solicitors for defendants read the deposition of James H. Flanagan, taken pursuant to notice and stipulation of solicitors for complainant and defendants, at Marshfield, Oregon, on November, 1912, who being first duly sworn according to law, testified in substance as follows:

Direct Examination.

That his name is James Henry Flanagan, age forty-three, residence Marshfield, Oregon, and was born in the vicinity of Marshfield, Oregon; that he is engaged in the banking business, is Vice-President of the Flanagan & Bennett Bank of Marshfield, is also President of the Coos Bay Water Company, and is general manager of the Flanagan Estate, a land hold-

ing corporation owning 1500 to 2000 acres in the vicinity of Marshfield; that said estate has been holding said lands for future development, and witness has noted the rise and fall of real estate values in Marshfield and vicinity; that the first marked increase in real estate values in the vicinity of Marshfield occurred in the spring or summer of 1906, and that he fixes said date by the transfer of the Dean property to the Smith interests, which deal was consummated in December 1906 or January, 1907; that he remembers of the time when the Norman tract was sold to Sengstacken and others, heard of it at the time, and has a recollection that he was approached to join the syndicate who purchased the property but that he refused to purchase for the reason that he "was not impressed with the proposition from an investment standpoint at that time, in fact it seemed pretty far off and looked like the values, the increase in values, were in the future."

And said witness on cross-examination further testified as follows in substance:

Cross-examination.

That he is quite positive that Mr. Smith approached him to join the syndicate purchasing the property, but is unable to recollect any of the circumstances connected therewith.

(Deposition of J. Albert Matson for Defendants.)

Whereupon solicitors for defendants read the deposition of J. Albert Matson, taken pursuant to notice

and stipulation of solicitors for complainant and defendants, at Marshfield, Oregon, on November, 1912, who being first duly sworn according to law, testified in substance as follows:

Direct Examination.

That his name is J. Albert Matson, age thirty-seven, residence Marshfield, business—merchant, and has been connected with the firm of Magees & Matson for seventeen years; that he has been on Coos Bay practically all his life, and continually for the last twelve years; that he has been in close touch with business conditions on Coos Bay for the last twelve or fifteen years and has bought and sold property; that the first increase of real estate values after 1900 occurred in connection with the building of the Drain road in 1906 or 1907; that the announcement of building did not create much excitement, but that after the Southern Pacific had made some investments in Coos Bay and actual construction work out of Drain commenced in 1906 and 1907 there was an increase in real estate valuations around Marshfield; that no influence was felt in real estate values from the operations of the Smith people prior to 1906; that he remembers the time in 1905 when the Norman tract was purchased by Sengstacken and Smith and that at that time he was solicited by Mr. Smith to join him in the purchase, which he refused to do, for the reason that he did not consider the value was there in that vicinity where there had been no activ-

ity and when it seemed that the increase in valuations would be made on the west side of Coos Bay.

And said witness on cross-examination further testified as follows:

Cross-examination.

That in 1905, at the time of refusing to take an interest in the purchase of the Norman tract, he made such investigation as any investor would make with reference to values in that vicinity.

(Deposition of Lyman Noble, for Defendants.)

Whereupon solicitors for defendants read the deposition of Lyman Noble, taken pursuant to notice and stipulation of solicitors for complainant and defendants, at Marshfield, Oregon, November, 1912, who being first duly sworn, testified in substance as follows:

Direct Examination.

That his name was Lyman M. Noble, age sixty-four, residence Marshfield, and had lived in Marshfield for the past thirty years; that during the last twelve years he has been engaged in selling real estate and that the first condition happening after 1900 which increased the prices and value of real estate in Marshfield and vicinity, was the taking over of the local railroad by the Southern Pacific interests; that he was acquainted with the Norman tract and that he considers the fair market value of said tract at the time prior to the taking over of the local railroad by

the Southern Pacific, as being from ten to fifteen dollars an acre; that about 1900 or later he had a mortgage on the property adjoining the Norman tract.

(Deposition of F. Timmerman, witness for defendant.)

Whereupon solicitors for defendants read the deposition of F. Timmerman, taken pursuant to notice and stipulation of solicitors for complainant and defendants at Marshfield, Oregon, November, 1912, who being first duly sworn testified in substance as follows:

Direct Examination.

That his name is F. Timmerman, age seventy-two, lives in Marshfield and has lived in Marshfield and vicinity for over forty years; that he owned the tract of land known in this testimony as the Timmerman tract adjoining the Norman tract on the North; that he sold his lands containing 273 acres to Henry Sengstacken for \$3000.00, and that there was nothing in conditions to raise the price of property in that vicinity between the time of his sale to Sengstacken and the time of the sale of the Norman tract to Sengstacken and Smith; that the tract he sold to Sengstacken contained about seventy acres of fine bottom land and that it was twice as valuable per acre as the Norman tract.

(Deposition of E. A. Anderson, witness for defendant.)

Whereupon solicitors for defendants read the de-

position of E. A. Anderson, taken pursuant to notice and stipulation of solicitors for complainant and defendants, at Marshfield, Oregon, November, 1912, who being first duly sworn, testified in substance as follows:

Direct Examination.

That his age is seventy, residence Marshfield, that he is retired; that he has been in all positions from a "school director up" in the town of Marshfield for sixteen years, was the first mayor of Marshfield and was County Commissioner of Coos County for six and a half years; that during the last ten years he has been buying and selling real estate on his personal account, that he is acquainted with the Norman tract; that in 1905 he would consider the reasonable value of said Norman tract anywhere from ten to twenty dollars an acre, that in fact he would not have given \$12.50 an acre for it at that time; that he was solicited to take an interest in the purchase of the Norman tract at the time Smith and Sengstacken purchased the same in 1905 and he refused to take such interest because he "could not see where there was any money in it;" that he was able to buy at that time and was in the market to purchase real estate.

(Deposition of Samuel Archer, witness for defendant.)

Whereupon solicitors for defendants read the deposition of Samuel Archer, taken pursuant to notice and stipulation of solicitors for complainant and de-

fendants, at Marshfield, Oregon, November, 1912, who being first duly sworn, testified in substance as follows:

Direct Examination.

That his name is Samuel Archer, age sixty-nine, residence Eastside, occupation a miner, and has been living in the vicinity of Marshfield for between thirty and forty years; that he has been engaged in coal mining and has been interested in coal mining propositions in the Coos Bay coal field; that he was foreman of the Flanagan mine for two years and experted mines for the Beaver Hill Company, for the Eden Company, and experted the Glasgow mine for Mr. Flanagan, all in the Coos Bay Coal Field; that he prospected for other parties in the Coos Bay Coal Field, and particularly prospected for John Norman on the tract of land involved in this litigation; that he owned property adjoining the Norman tract on the South and prospected the same very thoroughly, and that the same general conditions existed on the tract of land owned by him on the South as existed on the Norman tract; that he carefully and thoroughly prospected his own tract of land for coal, and from his knowledge gained thereby and gained from prospecting the Norman tract, he is of the opinion that the same is worth nothing for coal production purposes; that he knows of several persons who have tried to produce coal from the Norman tract and that they have all failed so to do successfully.

(Deposition of A. E. Seaman, witness for Defendants.)

Whereupon solicitors for defendants read the deposition of A. E. Seaman, taken pursuant to notice and stipulation of solicitors for complainant and defendants, at Marshfield, Oregon, November, 1912, who being first duly sworn testified in substance as follows:

Direct Examination.

That his name is A. E. Seaman, age forty-six, residence Marshfield, Oregon, and has lived in Marshfield and vicinity for twenty-two years, and his business for the last several years has been buying and selling of real estate principally; that he has been engaged in the buying and selling of Coos County real estate during the last twenty-one years and thereby has accumulated wealth to the extent of \$100,000.00; that real-estate values in and about Marshfield began to improve from about the middle of 1906 for the reason that the Southern Pacific Railway Company purchased the local railroad and the Beaver Hill coal mine, which gave the people of the community confidence, and the greatest reason of increase in values was the building of the Smith mill, which became assured during the latter part of 1906; that there was no increase in real estate values for two or three years prior to the taking over of the local railroad by the Southern Pacific Company, but in fact for two or three years immediately prior to the coming of the

Southern Pacific conditions were not as good in real estate lines as in 1900 and 1901; that he was acquainted with the Norman tract and that in 1905 he does not think it had any actual value; that is to say it was logged off land and it had no commercial value on account of there being no timber on it, and he did not consider it fit for agricultural purposes, and it could not possibly have anything but a speculative value, and in that year there was no immediate prospect of any change in conditions, and "to be honest with you, I would not have wanted to put any money in it at any price;" that taking the conditions as they existed in 1905, the reasonable market value of the Norman tract per acre was not in excess of ten or fifteen dollars.

(Deposition of J. W. Bennett, witness for defendant.)

Whereupon solicitors for defendants read the deposition of J. W. Bennett, taken pursuant to notice and stipulation of solicitors for complainant and defendants at Marshfield, Oregon, November, 1912, who being first duly sworn, testified in substance as follows:

Direct Examination.

That his name is J. W. Bennett, residence Marshfield, Oregon, occupation attorney, and has lived in Coos County since 1873, and in Marshfield since 1876; that he is President of the Flanagan & Bennett Bank, organized in 1889, the oldest bank in Coos County;

that since coming to Marshfield he has sold considerable real estate and has been interested in deals which others were making and in which he was the attorney; that the Southern Pacific announced the building of the Drain line August 5th, 1905, "but strange as it may seem, the announcement of the building of the road did not cause any perceptible advance;" that the most substantial advance in real estate came by reason of the Smith interests taking over the Dean & Company's interests and putting in their big mill; that he was acquainted with the Norman tract of land in the summer of 1905, "and going upon the theory that the principal portion of the marketable timber was off of it—had been logged—I should think \$4000.00 or \$10.00 an acre anyway would be a good price for it;" that the announcement of the building of the Drain road did not make a great deal of difference so far as values were concerned, but when the Southern Pacific afterwards bought out the Spreckles interests in the local railroad, it made things look more substantial, which was some months after the announcement of August 5th, 1905.

(Deposition of Fred K. Gettins, witness for defendant.)

Whereupon solicitors for defendants read the deposition of Fred K. Gettins, taken pursuant to notice and stipulation of solicitors for complainant and defendants at Marshfield, Oregon, November, 1912, who being first duly sworn, testified in substance as follows:

Direct Examination.

That his name is Fred K. Gettins, age forty-two, residence Marshfield, Oregon, business civil engineer and surveyor; that he was acquainted with the tract of land involved in this suit known as the Norman tract; that he surveyed the entire boundaries of such tract in 1907 and 1910; that he platted into townsite and sub-divided into lots, the Northeast Quarter and Lot Two of said tract, and that there was not over an acre and a half in any one place which would be suitable for agricultural land, the same being cut up with gullies, and on the back-bone between Catching and Isthmus Sloughs; that on Lot two of Section Thirty-six there was about eight to twelve acres of marsh land and the rest of the tract is of the same general character of land as that platted into a townsite; that in 1907 there was in East Marshfield only from six to nine houses, no stores, no postoffice, no schoolhouse, no church, and the only way of getting across from Marshfield was by row-boat.

(Testimony of complainant, Christian Herrmann, for complainant, (In rebuttal.))

Whereupon complainant to further support the issues on his behalf, took the stand in rebuttal, who, having been duly sworn, testified as follows:

Direct Examination.

Q. Did your wife, Mrs. Herrmann, Dora Herrmann, after going to Germany in 1900, return to this country?

A. No.

Q. What time in 1900 did she go there?

A. Summer 1900.

Q. And never returned afterwards?

A. No.

Q. How do you fix the date, Mr. Herrmann?
How do you know that—about the date?

A. The duty that I must pay in Germany. The law in Germany was that we must pay always two years after we arrive in country. That we must pay the first taxes on them.

Q. To the Government?

A. To the Government, and this was fixed from 8th of August.

Q. 8th of August, what year?

A. 1902, that we pay first taxes.

Q. Who for, Mrs. Herrmann?

A. Mrs. Herrmann.

Q. Was that done?

A. Yes, sir, I paid it.

Q. August 1902?

A. August 8, 1902.

Q. August 8, 1902?

A. Yes.

Q. Now during the year 1902 did Mrs. Herrmann have any negotiations that you know of, with Mr. Sengstacken here in reference to this Holcomb property?

A. In spring of 1902 come offer to Mrs. Norman for \$5000 for this Holcomb property; then Mrs. Nor-

man talk it over with me, and at first she would not deal any kind with Mr. Sengstacken. She knew him before and I will not spoil his reputation. I will not tell anything about what was told me.

Q. You don't need to tell anything of that.

A. Only that. Then after I was talking over, he might give you cash money, then you have nothing to do with him, then you are finished with this; better you make this deal with him, then we telegraph for not under \$6000 all pay cash.

Q. Who did you send that telegram to?

A. If it go to Hall or Sengstacken I can't tell. Either Sengstacken or Hall I can't remember so.

Q. Are you certain of the figures?

A. Yes.

Q. What did you do in pursuance of that? Did you receive a reply from him?

A. We then got from Mr. Hall these abstracts—what is it—contract or abstract—this deed; to sign it for the contract.

Q. What time. I put in your hand Plaintiff's Exhibit 30 for identification. Where did you receive that from?

A. Mr. Hall sent it to us.

Q. And what did you do in reference to it?

A. Go to German consul—American Consul and sign it—my wife and I.

Q. What was the purpose of your signing and sending that back?

A. Purpose—what is that?

COURT: What did you expect them to do with it?

Q. What was it for?

A. The land was then sold if we sign it.

Q. To whom?

A. Mr. Sengstacken.

Q. And what did you do with it, this deed?

A. Sent back to Mr. Hall. Judge John F. Hall.

Q. When did you see it next?

A. Then I saw it after I come back; after I came here to Marshfield in 1909.

Q. Where?

A. Mr. Hall gave me the whole box, then was this paper in it, I find it.

Q. And what was the outcome of the sending of this deed?

A. Mr. Hall gave no answer. The thing was finished then.

Q. Did you ever receive any reason in reference to the deed?

A. No.

Mr. ST. RAYNOR: I offer this deed in evidence.

Marked "Plaintiff's Exhibit 30" (hereto attached and made a part hereof).

A. About his remembrance, Mr. Hall told in his testimony that Mrs. Norman gave him to sell this land for \$2000 before going to Germany. It cannot be right; then Mrs. Norman speak it over at this time, this land was sold in 1890 for \$12,000—then it was for six thousand in cash—yes \$6000.00 something, and the mortgage was foreclosed and came in the

hands of Mr. and Mrs. Norman; therefore it was not much so high, in any case; he told in this it will be \$10,000; that she will have it in cash; therefore she will give it away for \$6000. Then after come a letter from Mr. Hall that cannot sell this land at all, and it always come cheaper, he say, that price; every year, every year, cheaper. My wife was not young at all and she like all the money she got in before she died. She thought I was not at all competent to look over this property at all, therefore she write, send some money.

(Solicitor for complainant then read to the Court, Plaintiff's Exhibit 30.)

COURT: What is the date of that?

Mr. ST. RAYNOR: October 27, 1902.

COURT: Does that deed describe all of the land or only part of it?

Mr. ST. RAYNOR: That only described a part of this land, your Honor.

Mr. PECK: Describes all the surface of it.

Mr. ST. RAYNOR: All the surface of the land?

Mr. PECK: The only exception is the coal rights.

Mr. ST. RAYNOR: In lot 3.

COURT: The only exception is the coal rights.

WHEREUPON the complainant to further support the issues in his behalf introduced in evidence in rebuttal the answer of John F. Hall, L. D. Smith, J. J. Clinkinbeard, D. L. Rood, Henry Sengstacken, S. C. Rogers, Title Guaranty & Abstract Company, a corporation, Trustee, and Z. T. Siglin and East Side

Land Company, a corporation, defendants in that certain equity suit heretofore pending in the Circuit Court of the United States for the District of Oregon, in which Christian Herrmann was the complainant, and the above named persons were defendants, being Equity Suit No. 3824, filed in said Court on the 2nd day of October, 1911.

The particular portion of said answer to which Complainant desires to call the Court's attention is as follows:

—That from the time said Dora Norman Herrmann left Marshfield in 1903, up to the time that said described property was sold, as aforesaid on August 1st, 1905, there was very little, if any change in business conditions and the prices of property in and about Marshfield.

That on or about August 1st, 1905, defendants, Henry Sengstacken and L. D. Smith agreed with the defendant, John F. Hall, that they would purchase the lands described in the complaint, at a price of Four thousand four hundred dollars (\$4400.00), one-half cash down and the balance to be paid within one year, with interest at the rate of six per cent. per annum, secured by a mortgage upon said described lands; that the defendants, Sengstacken and Smith then and there, on August 1st, 1905, to bind the bargain, gave to the said John F. Hall a promissory note for fifty dollars (\$50.00); that then and there the bargain was made and consummated for the sale and purchase of said land by and between said Dora Nor-

man Herrmann, by her attorney in fact, John F. Hall, and defendants, Henry Sengstacken and L. D. Smith.

Pending the examination of the abstract to be furnished by said Hall, the defendants, Sengstacken and Smith attempted to form a pool or syndicate for the taking over of their agreement to purchase as afore-said, and to that end interviewed several business men in and about Marshfield, many of whom refused to enter the syndicate, for the reason that the price paid for the land did not make an attractive bargain. On August 30th, 1905, defendants Sengstacken and Smith reported to defendant John F. Hall that they had formed a syndicate or pool to take over their agreement with him in the matter of purchasing said land, and that said syndicate or pool was made up of the following members, with the following proportionate interests:

J. J. Clinkinbeard.....	two twelfths.
L. D. Smith	three twelfths
Henry Sengstacken	three twelfths
S. C. Rogers	(Two) one twelfth
D. L. Rood	one twelfth

making in all eleven twelfths, and the said defendants Sengstacken and Smith requested the said John F. Hall, in lieu of commissions in part to take the remaining one twelfth interest in said syndicate; the said defendant, John F. Hall, at first refused, but afterwards agreed and did take a one twenty-fourth interest with the stipulation that James T. Hall, his brother, should likewise take a one twenty-fourth in-

terest; thereupon the interest of said Dora Norman Herrmann and this Complainant in said lands was transferred by John F. Hall their attorney in fact, to the Title Guarantee & Abstract Company, a Corporation, Trustee, to hold the same in trust for the several aforementioned owners of said syndicate in proportion to their respective interests; that upon acquisition to the title to said property by Title Guarantee & Abstract Company, a Corporation, Trustee, no certificates, as alleged by Complainant, were issued to the several members of said Syndicate, but to each of said pool members was delivered a memorandum showing his respective interest.

That said answer was signed as follows:

Henry Sengstacken
Title Guarantee & Abstract
Company a corporation, trustee
by Henry Sengstacken

-----President
Title Guarantee & Abstract
Company a corporation by
Henry Sengstacken President

Eastside Land Company
by Henry Sengstacken, President

John F. Hall

L. D. Smith

Defendants.

That said answer was duly subscribed and sworn to by defendant, Henry Sengstacken, before a Notary Public, for the State of Oregon, on the 28th day of September, 1911.

(Testimony of defendant, Henry Sengstacken, for defendants,—In rebuttal.)

Whereupon defendants to further support the issues on their behalf, called Henry Sengstacken in rebuttal, who having been duly sworn, testified as follows:

Direct Examination.

Q. Did you verify the answer last introduced by the plaintiff, and the answer in this case?

A. Yes.

Q. Now, what happened if anything between these two verifications, which enabled a different statement in the answers—in the second answer?

A. The first answer in relation to the first payment on the transaction was from memory, and I afterwards hunted up the note, and found that I was mistaken in the date and corrected it accordingly.

Q. And also the amounts; the first answer, I believe, states that the note was for fifty dollars.

A. Well, I suppose in my mind, I figured the fifty each. Anyway the note was for \$100.00; that was correct.

Q. And did you have the note under your supervision when you verified the first answer?

A. No. That is I didn't find it until afterwards.

Q. I hand you plaintiff's exhibit 30 and ask you if you ever saw that at the time that it was purported to have been prepared and executed.

A. I have no recollection of seeing it at all.

Q. Did you prepare that deed?

A. No, sir.

Q. Was that ever prepared under any agreement with you as to the consideration therein expressed?

A. It is Greek to me. I don't know anything about it.

Q. Is any of the handwriting in connection with the deed in the handwriting of yourself?

A. No, sir.

Q. Or your office?

A. No, sir.

Q. Did you ever direct any such deed as this to be made, as far as you know?

A. Not that I remember of.

Q. Don't ever remember of having any contract embodying the terms which are in this deed?

A. No, have no recollection of any such direction.

(Testimony of defendant, John F. Hall, for defendant, (In rebuttal.)-)

Whereupon defendant to further support the issues on their behalf, called John F. Hall in rebuttal, who, having been duly sworn, testified as follows:

Direct Examination.

Q. Have you any memorandum which will enable you to locate the last time that you saw Mrs. Nor-

man in this country?

A. It was about April 4, 1901.

Q. How do you know that?

A. Well, we had a book which she left with me when she went away and I kept her account in that book, memorandums and anything else. After she had been to Germany and she came back, and went over, and she had a man, I understood by the name of Walters; she had the book in San Francisco and he wrote her name in it and address, and I kept her accounts in this book, and when she returned, we settled, and I marked across the book "Settled." The last in here is April 4, 1901.

Q. Do you remember that marking across the book "Settled" was made while she was here?

A. That was made at the time we settled.

Q. What is the date of that entry?

A. The last entry is April 4, 1901.

Q. So that the settlement may have been subsequent to that date—may have been later than that date.

A. Made on that day I think, or in a few days afterwards. I will state further when she went to San Francisco she left me the book, and we went down right through the pieces she had—every different piece of property.

Q. In whose handwriting is that?

A. The handwriting—this is my handwriting, but was done in her presence and she was there. When she went to San Francisco, the first time.

Book marked "Defendants' Exhibit EE."

Q. That was at what time?

A. That was June 19, 1898.

Q. And what—was there any price put at that time upon this property?

A. There was.

Q. And what was the price?

A. The price put at that time was \$2000.00.

Q. Was that entered in that book in her presence?

A. In her presence.

Q. By you?

A. By me, right in her presence. I have got the list of all the property that she left with me to sell at that time.

Q. Have you had that book in your possession?

A. The book has been in my possession, yes, except a little while when she had it sent to Walters in San Francisco, and he wrote the address here, and it was returned to me by her.

Q. Is there anything in that book that shows the time she raised that price to three thousand dollars?

A. There is nothing to show that; that was after she came back from San Francisco that she raised to \$3000.00.

Q. I hand you Plaintiff's Exhibit 30 and ask you what you know about that deed.

A. Well, this deed was received by me, I think from Mr. Walters from San Francisco. I remember receiving the deed, and when it was turned down, it was put in a tin box where I kept all of Mrs. Nor-

man's papers and turned over to Herrmann.

Q. Was it prepared by you or in your office?

A. No, this wasn't prepared by me. I don't know the handwriting here. I don't know whose handwriting this is in. If it was prepared in my office I don't know anything about it, and it was sent to me by Mr. Walters.

Mr. PECK: We offer as an exhibit the memorandum book from which the witness has testified.

Mr. ST. RAYNOR: Will you refer to the pages; you are not going to offer the whole book are you?

Mr. PECK: The pages are not numbered, I think for the purpose we wish it, the whole book is material.

A. That contains all the information and entries I had to her account until she went to Germany the last time.

Mr. PECK: (After numbering pages) I note on page 8 of this memorandum book nine pieces of property listed at certain prices, and ask you what these parcels of property are and what the prices are, and what the purpose of making the entries was?

A. This is a list of the property she left with me to sell. Entry No. 1 is the timber claim known as the Sprague claim. No. 2 is the Holcomb land, the land in controversy now. The Sprague claim was listed at \$8000.00.

Q. When were these entries made?

A. They were made on the date there, June 19, 1898.

Q. Were those entries made in the presence of Mrs. Norman?

A. They were.

Q. Were these the agreed prices for which you were permitted to sell?

A. That was the price she gave me to sell the property—set on the property to sell.

Mr. ST. RAYNOR: These items on page 8 of the book show—is an entry you made at that time, is it?

A. At that time.

Mr. ST. RAYNOR: In your own handwriting?

A. My own handwriting.

Mr. ST. RAYNOR: And what is that date?

A. It is on the book there; June 19, 1898 I think.

Mr. ST. RAYNOR: June 19, 1898?

A. Yes.

Mr. ST. RAYNOR: And were all of these items entered in here by you?

A. I think most of them. Now her address when she went to Germany was written in there, she said by Mr. Walters.

Mr. ST. RAYNOR: Will you show me that one place. (Witness does so.) And whose handwriting was that in?

A. I understand it was by Mr. Walters, I didn't see him write it.

Mr. ST. RAYNOR: And you don't know when that was written in there, do you?

A. It was written between the dates; you will notice the date behind the last date there, and the

first date on the pages following. I don't know what dates.

Mr. ST. RAYNOR: What is this 1899?

A. Then she took it down there for him to go over. Then here is the other items that were made, continued until the time she went to Germany until the time she returned.

COURT: What is the first item on the next page, Judge? What is the first item after her address?

A. After her address, is May 5, 1900.

COURT: That is your writing is it?

A. These are all my handwriting. I think everything in there on those two pages are my handwriting.

Mr. ST. RAYNOR: Now, as a matter of fact, Judge, that entry where you have her address is after June, 1899, isn't it?

A. After June 1899.

Mr. ST. RAYNOR: Now, there is nothing to indicate the date that address was put there.

A. No, this book was turned over, and she took it to San Francisco and then returned it to me with her address. She wrote a letter stating she would write the address right in there.

Mr. ST. RAYNOR: What I mean, Judge, there is nothing in that book to indicate what the date was that address was put there, either before or after that preceding item, which is June 1899, and the succeeding item is May 5, 1900.

A. Yes, between those dates, but I don't know

what date.

Mr. ST. RAYNOR: That is all there is to that.

A. It is between those dates; that is all I know about that.

Mr. ST. RAYNOR: Was there any other item you called attention to?

Mr. PECK: He said he made those statements after that date.

COURT: On that date.

A. On or after. I think on the date because when she returned from Germany we settled, and I marked it settled.

Mr. PECK: We are simply going to introduce that for the purpose of showing she was here April 4, 1901.

Mr. ST. RAYNOR: This pencil mark is what you say you placed on there—the word “Settled?” On both these pages, 18 and 19?

A. Yes, both these pages.

Mr. ST. RAYNOR: And what does that refer to having been settled?

A. That is when she returned, she came in and we figured up what I had and we settled, and just marked it off.

Mr. ST. RAYNOR: What was it that was settled, is what I mean—her account?

A. Her account, if you will turn back a page or two you will see where I collected the rentals.

COURT: Settled up transactions between you and her prior to that date?

A. Prior to that date. You will see the indica-

tions on the other page.

COURT: It is offered for the purpose of showing she fixed the price of \$2000.00 when she went to San Francisco, and showing the date on which she was here, April, 1901.

Mr. PECK: We ask to read into the record the second item on page 8 of this book:

"2 Holcomb Land

Sec 36 T 25 - 13

\$2000.00"

Mr. ST RAYNOR: I would prefer to have the evidence showing how prepared.

COURT: Let the entire book go in.

Mr. PECK: Exactly what I would like to do.

A. I would say further at the time when we did that she had that much against the property. The property was mortgaged and they failed to pay and they bought the property in for what they had against it, and that was a little more than what she had against the property at that time, and on the last foreclosure we figured up interest, principal and taxes at that time and bought it in for what she had against it \$3017 and something. That included taxes, interest and everything.

Mr. ST. RAYNOR: Have you any other data, Judge, to show she was here after 1900, other than that item in that book made by you?

A. After she went away the last time, I put my entries in my ledger.

Mr. PECK: We offer the book in evidence and mark pages 18 and 19 in connection with witness' tes-

timony.

Whereupon the said witness upon cross-examination, testified as follows:

Cross-examination.

Q. Who is this man Walters you refer to?

A. He was a man who was in business in San Francisco. He used to transact her business. Kind of an adviser.

Q. He was a resident of San Francisco?

A. He was a resident of San Francisco.

Q. Did he ever live in Marshfield?

A. No. He never lived in Marshfield, but he was a friend of hers. I don't know whether acquainted in the old country or whether she got acquainted with him in San Francisco. But he was a German and she used to advise with him concerning her matters—business matters.

Q. And you think this exhibit may have been sent to you through Mr. Walters. (Referring to Plaintiff's exhibit 30).

A. My recollection is that it came through Walters.

Q. I will ask you to look again. Isn't it a fact that was prepared by you on your typewriter?

A. I don't think so.

Q. How?

A. I don't think so. It don't look like my typewriter.

Q. Is that your typewriting on that (Showing an-

other paper).

A. That is the typewriter; that is mine, I think, yes.

Q. Well, isn't that the same kind, same kind of typewriting?

A. It is similar but the typewriter I use now is different than the one I had at the time this was made.

Q. But this was in 1908.

A. This was in 1908, and as I say that is a different typewriter we use.

Q. Did you have a different typewriter in 1908 to the one you had in 1902?

A. Let's see. In 1908—let's see—I changed my typewriter—Let's see—I have had three. I think we got a new one about 1901 or 1902. I am not certain of the date we got that.

Q. When did you change it again?

A. Haven't changed it since.

Q. Have had it since 1902?

A. 1902; either 1901 or 1902, we got a new one, but I don't think that was prepared; I don't remember ever seeing that until it was returned to me. I think it was Walters sent it to me.

Q. Have you any idea where Walters secured the description of this land from, and sent to Mrs. Norman?

A. He had descriptions of everything she had. I don't remember of seeing that at all. As I say—if it was prepared, it was prepared in my absence.

Q. Didn't you correspond with Mrs. Norman af-

terwards Mrs. Herrmann in regard to this transaction with Mr. Sengstacken?

A. When it was turned down. You will find the letter there where I wrote it had been turned down.

Q. Did you present this deed to Sengstacken?

A. I don't think I did. I think I told Sengstacken that I had it, and they turned the proposition down at the time. I remember saying to him that the deed of the transaction had come but they turned it down.

Q. You turned this exhibit over to Mr. Herrmann when he came up here?

A. I think that was in the box. I kept all of Mrs. Norman's papers in a tin box and when he came, I turned all the papers over to him.

COURT: What is the date of that deed?

Mr. ST. RAYNOR: 27th of October, 1902.

A. And I don't know the handwriting on the back of that. I never had anybody in the office that wrote a handwriting like that?

Q. There is a stamp "Hall & Hall" on the back of it.

A. That is a rubber stamp I had in our office.

Q. That is what you used?

A. Most all of the papers we prepared.

Q. Look at the eyelets; do you recall using eyelets like that?

A. We have eyelets like that.

Q. You evidently forgot about that deed.

A. I don't remember that deed and another thing is the handwriting on the back of it.

Q. Yes, that is true, but that is a long while ago, Judge.

A. Yes, but I don't remember ever having anybody in the office that wrote a hand like that.

Q. You have got the eyelets, and your paper and stamp, on there, and similar typewriting, haven't you?

A. Yes.

Q. I think the earmarks are there.

A. It looks like some things we get out of our office, but I don't remember making it. I remember the deed being sent me; I am positive it came through Walters.

Whereupon the said witness upon redirect examination, testified as follows:

Redirect Examination.

Q. In examining defendant's Exhibit EE on page 8, this entry "Holcomb Land, Sec. 26, 25, 13, \$2000" I call your especial attention to that and ask if those figures were ever changed. They seem to be blurred some. I ask you if there is any explanation to make.

A. When she made it three thousand dollars, I wrote \$3000.00 underneath there and it was afterwards rubbed out.

Q. When she changed it to \$3000.00?

A. When she changed it to three thousand, I put the "3" put three thousand, and afterwards it was rubbed off.

Q. You afterwards changed it back to two.

A. Left it as it was.

The foregoing statements of the evidence contains a statement of all of the testimony and evidence offered and given in the above entitled suit in respect of, or pertaining to the alleged contract and transaction between John F. Hall, defendant, and John F. Hall, James T. Hall, L. D. Smith, Rosa M. Smith, Henry Sengstacken, Z. T. Siglin, J. J. Clinkinbeard, S. C. Rogers, D. L. Rood, William O. Christiansen, Title Guarantee and Abstract Company, Trustee, and Eastside Land Company, regarding the alleged sale and conveyance of the real estate involved in this suit by the said John F. Hall as attorney in fact for Dora Norman Herrmann and the complainant, to the said John F. Hall, James T. Hall, L. D. Smith, Rosa M. Smith, Henry Sengstacken, Z. T. Siglin, J. J. Clinkinbeard, S. C. Rogers, D. L. Rood, William O. Christiansen, Title Guarantee and Abstract Company, Trustee, Eastside Land Company, together with all of the testimony and evidence offered and given in respect of the alleged transaction and acquirement by the said John F. Hall, James T. Hall, L. D. Smith, Rosa M. Smith, Henry Sengstacken, Z. T. Siglin, J. J. Clinkinbeard, S. C. Rogers, D. L. Rood, William O. Christiansen, Title Guarantee and Abstract Company, Trustee, Eastside Land Company, of the respective interests claimed by them, and each of them in said real estate under the deed dated August 30-1905, and executed and acknowledged on the 31st of August 1905, by said John F. Hall, as attorney in fact for said Dora Norman Herrmann and the complainant to the

Title Guarantee and Abstract Company, Trustee,
copy of said deed being attached to the bill of complaint herein marked Exhibit B.

“PLAINTIFF’S EXHIBIT B.”

State of Oregon,
County of Coos—ss.

I, J. J. Clinkinbeard, being first duly sworn on oath depose and say that I was one of the purchasers of the 280 acres of land known as Eastside, Marshfield, further described as the Northeast quarter, and lot two, and the West one-half of the Southeast quarter of Section thirty-six in township twenty-five, range thirteen West of the Willamette Meridian, Coos County, Oregon, jointly with Henry Sengstacken, S. C. Rogers, L. D. Smith, D. L. Rood, John F. Hall; but that as I recollect I never received a deed of conveyance for the same, but it was held in trust by some other person for me. I afterwards sold all of my interest in said premises to L. D. Smith for about \$2250.00 and that I now claim no interest of any kind whatever in or to said premises.

(Signed) J. J. Clinkinbeard.

Subscribed and sworn to before me this 26th day of June 1911.

Chas. I. Reigard,
Notary Public for Oregon.

(Notarial Seal)

“PLAINTIFF’S EXHIBIT 21.”

THIS INDENTURE WITNESSETH, That Title

Guarantee and Abstract Company, a corporation organized and existing under and by virtue of the laws of the State of Oregon, Trustee, the first party, for and in consideration of One Hundred (\$100.00) Dollars to it paid, does by these presents, grant, bargain, sell and convey unto Eastside Land Company, a corporation of Oregon, its successors and assigns, the second party, all the following bounded and described property, situated in the County of Coos, and State of Oregon, to-wit:

The Northeast one quarter (N.E.¼) Lot Two (2), and the West one half (W.½) of the Southeast quarter (S.E.¼) of Section Thirty Six (36) in Township Twenty Five (25) South of range Thirteen (13) West of the Willamette Meridian, excepting therefrom however, all such portions of officially recorded plats of Eastside and Home Addition to Eastside, Coos County, Oregon, as have previously been deeded or contracted by Title Guarantee and Abstract Company, Trustee, and which sales by deed or contract we hereby in all respects approve and confirm, as well as all its acts connected with the sale of such property. And also excepting from the above described property, that part of the Northeast one quarter, and Lot Two of Section Thirty Six (36) in Township Twenty Five (25) South, of Range Thirteen, west of the Willamette Meridian, contained in block 38, 39, 52, 53, 54, 55 and 56 of the Townsite of East Marshfield, as per plat and dedication thereof on file and of record in the office of the County Clerk in said

Coos County, as described in deed from the Title Guarantee and Abstract Company, to the East Marshfield Land Company, recorded on page 168, volume 49, Deed Records of Coos County, Oregon, and to which deed reference is hereby made. Also conveying hereby Lots Ten (10) and Eleven (11) in Section 31, of Township 25 South, of Range 12 west of the Willamette Meridian, which is now and always has been since it was deeded to the Title Guarantee and Abstract Company, Trustee, by Henry Sengstacken and wife, exclusively, the property of said Henry Sengstacken and wife only; and also all the rights and privileges as conveyed by deed from Dora Herrmann and husband to Title Guarantee and Abstract Company, a corporation, Trustee, as recorded in Volume 41, page 336, of the records of Deeds to Coos County, Oregon, to which deed reference is hereby made. This deed is given for the purpose of conveying all right, title and interest said Title Guarantee and Abstract may have or hold as Trustee in and to the foregoing property.

TO HAVE AND TO HOLD THE SAME, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, unto the said Eastside Land Company, its successors and assigns, forever. And Title Guarantee and Abstract Company, Trustee, does covenant to and with Eastside Land Company, its successors and assigns, that it is lawfully seized in fee simple of all the right, title and interest which

said Title Guarantee and Abstract Company, Trustee, ever received or acquired as grantee, in and to said premises by virtue of deed conveying different portions thereof, from Dora Herrmann and husband, Henry Sengstacken and wife, and East Marshfield Land Company, a corporation of Oregon, officially recorded in Deed Records, of Coos County, Oregon, and that the premises are free from all incumbrances created by or against said Title Guarantee and Abstract Company, Trustee, except that certain mortgage to the First Trust and Savings Bank of Coos Bay, officially recorded in the mortgage records of Coos County, Oregon, on which there is due and owing, the sum of \$1,232.36, together with interest at the rate of six percent per annum from September 19-1910, and also except the last half of 1910 taxes, on said property, coming due next October, both of which indebtedness however, said Title Guarantee and Abstract Company, Trustee, hereby agree to pay; and that it will, and its successors and assigns shall warrant and forever defend the above granted premises and every part and parcel thereof against all lawful claims and demands of all persons whomsoever claiming or arising by, through or under it.

IN WITNESS WHEREOF, The said Title Guarantee and Abstract Company, Trustee, has by a resolution of its Board of Directors, caused these presents to be executed by its president and secretary, this 22nd day of July, A. D. 1911.

TITLE GUARANTEE &

ABSTRACT COMPANY,
Trustee.
By HENRY SENGSTACKEN,
President.
and By R. T. STREET,
Secretary.

Signed, Sealed and delivered in the presence of
F. K. Gettins.

D. L. Buckingham
(Corporate Seal)

State of Oregon,
County of Coos—ss.

This is to certify that on this 22nd day of July A. D. 1911, before me, the undersigned, a Notary Public for Oregon, in and for the County of Coos, appeared Henry Sengstacken and R. T. Street, to me personally known, who being duly sworn did say, that he, said Henry Sengstacken is president, and he, the said R. T. Street, is secretary of Title Guarantee and Abstract Company, a corporation, Trustee, that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was signed, and sealed in behalf of said corporation by authority of its Board of Directors; and the said Henry Sengstacken and R. T. Street, acknowledged said instrument to be the free act and deed of said corporation.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal the day and

year last above written.

F. K. Gettins.

(Seal) Notary Public for Oregon.

Recorded July 26-1911 10:00 A. M.

“PLAINTIFF’S EXHIBIT 29.”

(Caption omitted.)

To each and all of the above named defendants, and to C. R. Peck, Esq., Arthur K. Peck, Cassius R. Peck, C. S. Sehlbrede, attorneys for said defendants.

You and each of you are hereby notified that the plaintiff above named Christian Herrmann demands of you, and you and each of you are hereby demanded to produce and present at the trial of the above entitled cause, each and all of the following described instruments, papers and documents towit:

All letters received by Hall and Hall, J. F. Hall, John F. Hall, James T. Hall, J. T. Hall, at any and all times from Christian Herrmann, Dora Herrmann, and Dora Norman or either of them together with any and all telegrams, receipts, statements or other documents so received by said parties from the said Christian Herrmann, Dora Herrmann or Dora Norman.

Also all letters, telegrams, statements, notices, reports, or all copies of all such letters, telegrams, statements, notices and reports in any manner sent or mailed to Christian Herrmann, Dora Herrmann or Dora Norman at any and all times.

Also all books of account and records, showing the

amounts of money or other thing or things of value, which books of account or records are now in the custody or control of Hall and Hall, John F. Hall, J. F. Hall, James T. Hall, or J. T. Hall, and which said books of account or records, show or record any and all transactions between said persons between said Christian Herrmann, Dora Herrmann, or Dora Norman.

Also that you so produce each and all, messages, telegrams, statements, certificates, statements of accounts, and any and all other correspondence, or copies thereof now in the possession of and in the control of Henry Sengstacken, the Eastside Land Company, the Title Guarantee and Abstract Company, or said John F. Hall, James T. Hall, or Hall and Hall in any manner relating to the real estate or business involved in the real estate in controversy in this suit, also all books of account and other records in the possession of or in the control of said parties or either of them relating to said party or any part thereof.

That all of the above described matters, are demanded from said defendants for use at the trial of the above entitled cause at Portland, Oregon, on the 17th day of December A. D. 1912, and thereafter on the part of said Plaintiff.

Robert J. Upton,
E. S. J. McAllister and
Chas. I. Reigard,
Attorneys for Complainant.

Due and legal service of the above and foregoing

notice and demand is hereby admitted and accepted, and the receipt of a true and correct copy of the same acknowledged at Marshfield, Oregon, this 13th day of December A. D. 1912.

Cassius R. Peck,
Attorney for Defendants.

"PLAINTIFF'S EXHIBIT 30."

THIS INDENTURE made the 27th day of October, 1902, between Dora Herrmann (formerly Dora Norman), and Christian Herrmann, her husband, of Hanover, Germany, parties of the first part, and Henry Sengstacken of Marshfield, Coos County, Oregon, party of the second part, WITNESSETH:

That the said parties of the first part for and in consideration of the sum of Six Thousand Dollars (\$6000) lawful money of the United States of America to them in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold, conveyed, confirmed, and by these presents do grant, bargain, sell, convey and confirm to the said party of the second part and to his heirs and assigns forever, all the following described pieces or parcels of land situated in the County of Coos and State of Oregon, and bounded and described as follows, to-wit:

The northeast quarter and the west half of the southeast quarter and lot two, all of Section thirty-six in Township twenty-five, South of range thirteen west of the Willamette Meridian and all other rights conveyed by John or Dora Norman to George U.

Holcomb by deed dated May 5, 1890.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; and all the estate, right, title, interest, possession, claim and demand as well in law as in equity, of said parties of the first part, of, in or to the above described premises and every part and parcel thereof, with the appurtenances thereunto belonging;

TO HAVE AND TO HOLD all and singular the above mentioned and described premises together with the appurtenances, unto the said party of the second part, and unto his heirs and assigns forever.

And the said parties of the first part do covenant to and with the said party of the second part, his heirs and assigns, that the said premises are free from all encumbrances and that they are the owners in fee simple of the said premises and that they will and their heirs shall warrant and forever defend the same against the lawful claims of all persons whomsoever claiming or to claim the same.

IN WITNESS WHEREOF the parties of the first part have hereunto set their hands and seals the day and year first above written.

(Signed) Dora Herrmann (Seal)

(Signed) Christian Herrmann (Seal)

Done in the presence of:

C. C. Stevenson

Lenore Rasck

Germany, Europe,

Province of Hanover,—ss.

Consulate of the United States

City of Hanover,

Empire of Germany.

THIS CERTIFIES that on this 27th day of October, 1902, before me, the undersigned, Jay White, Consul of the United States, personally appeared the within named Christian Herrmann and Dora Herrmann, his wife, to me known to be the identical persons described in and who executed the above instrument and severally acknowledged to me that they executed the same freely and voluntarily for the uses and purposes therein set forth.

IN WITNESS WHEREOF I have set my hand and official seal the day and year last above written.

(American Consulate seal) (Signed) Jay White,

United States Consul

Hanover, Germany."

That on the back of said deed appears the following:

"Warranty Deed. Dora Herrmann and husband to Henry Sengstacken. Dated October 27, 1902. Office of Hall & Hall, Attorneys at Law, Marshfield, Oregon."

"PLAINTIFF'S EXHIBIT 31."

(Check)

"No. 1113

Marshfield, Oregon, Aug. 31-1905

FLANAGAN & BENNETT BANK.

Pay to John F. Hall—————or order, \$544.85|100

Five Hundred and forty-four 85|100—.....Dollars.

(Signed) Henry Sengstacken."

Across the face of said check, stamped in red ink, appears the following:

“FLANAGAN & BENNETT BANK

PAID

August 31, 1905.

MARSHFIELD, OREGON.”

And said check is endorsed as follows on the back thereof:

“Pay to the order of

FLANAGAN & BENNETT BANK

Marshfield, Ore.

JOHN F. HALL.”

“PLAINTIFF’S EXHIBIT 32.”

“TITLE GUARANTEE & ABSTRACT COMPANY,

Henry Sengstacken, Manager,

Marshfield, Oregon.

THIS IS TO CERTIFY that Mrs. Rosa M. Smith is the undivided one-fourth owner of land conveyed by Dora Herrmann and her husband. Dated September 1st, 1905, and recorded on page 336 in Book forty-one of Deeds, Coos County, Oregon, containing 280 acres of land more, or less, and being deeded to Title Guarantee & Abstract Company, trustees.

(Signed) Title Guarantee and Abstract Company

By Henry Sengstacken,

Manager.

Dated at Marshfield, Oregon.

Sept. 1st, 1905.

“DEFENDANT’S EXHIBIT BB.” (note)

\$100- Marshfield, May 17-1905.

Ten days after date, without grace, we promise to pay to the order of Hall & Hall at Marshfield, Oregon, One Hundred and No|100—————Dollars. In Gold Coin of the United States of America, with interest thereon in like Gold Coin at the rate of 8 per cent per annum from date until paid, for value received. Interest payable annually and in case suit or action is instituted to collect this note or any portion thereof, we promise to pay such additional sum as the Court may adjudge reasonable as attorney’s fees in said suit or action.

No. — (Signatures have been cut from note)
Due —

Across the face of said note is endorsed the following:

“Paid by purchase of land. Mrs. Dora Herrmann.”

“DEFENDANT’S EXHIBIT CC”

Title Guarantee & Abstract Company.

Henry Sengstacken, Manager.

Marshfield, Oregon.

October 2nd, 1905.

This is to certify that J. F. Hall is the undivided one-twelfth owner of land conveyed by Dora Herrmann and her husband. Dated Sept. 1st, 1905, and recorded in Book 41 of Records, page 336, Coos County, Oregon, containing 280 acres of land, more or less,

and being deeded to Title Guarantee and Abstract Company, trustees.

(Signed) Title Guarantee & Abstract Company
By Henry Sengstacken,
Manager.

Across the back of said certificate appears the following:

"One-half of this interest belongs to James T. Hall.
Dated this 4th day of October, 1905.

(Signed) John F. Hall."

The above named complainant prays the Court to allow the foregoing statement, as and for the statement of evidence in the above entitled suit, and to order that the same be made a part of the record thereof and filed therein.

Dated this 28th day of July 1913.

CHRISTIAN HERRMANN,
Complainant.

By

HENRY ST. RAYNOR,

and

ROBERT J. UPTON,

Solicitors for Complainant.

UNITED STATES OF AMERICA,

District of Oregon,—ss.

Now at this time, the respective solicitors for the above named complainant and defendants being present in Court, on motion of the complainant and the Court being fully advised in the premises, hereby allows and settles the foregoing statement as and for

the statement of evidence in the above entitled suit on the appeal from the decree of this Court to the United States Circuit Court of Appeals for the ninth circuit, and hereby orders that the same be made a part of the record and filed in the above entitled suit, and it is hereby further ordered and directed by the Court that the portions of testimony in the foregoing statement wherein the respective questions and answers of the several witnesses are therein reproduced in the exact words of said respective witnesses, be and the same are hereby directed by the Court to be allowed herein.

Dated this 3rd day of December, 1913.

R. S. BEAN,

Judge of the United States

District Court for the District of Oregon.

[Endorsed]: Statement of Evidence. Filed Dec. 3, 1913.

A. M. CANNON,

Clerk U. S. District Court.

And afterwards, to wit, on the 31 day of July, 1913, there was duly filed in said Court, a Petition for Appeal, in words and figures as follows, to wit:

[Petition for Appeal.]

(Title.)

To the Honorable, the Judges of the District Court of the United States for the District of Oregon:

The above named complainant, feeling himself aggrieved by the decree made and entered in this cause on the 17th day of February, 1913, does hereby appeal

from said decree to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the Assignment of Errors which is filed herewith, and he prays that his appeal be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, in the State of California.

And your Petitioner further prays that the proper order touching the security to be required of him to perfect his appeal, be made.

CHRISTIAN HERRMANN,
Complainant.

By HENRY ST. RAYNOR.
ROBT. J. UPTON,
Solicitors for Complainant.

[Endorsed]: Petition for Appeal. Filed Jul. 31, 1913.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 31 day of July, 1913, there was duly filed in said Court, an Order Allowing Appeal, in words and figures as follows, to wit:

[Order Allowing Appeal.]
(Title.)

This day came Christian Herrmann, complainant, appearing by Henry St. Raynor and Robert J. Upton,

his solicitors of record, and presented his petition for an appeal and assignment of errors accompanying the same, which petition, upon consideration of the Court, is hereby allowed, and the Court hereby allows an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, upon the filing of a bond in the sum of \$500.00 with good and sufficient surety to be approved by the Court, and it is hereby ordered that a complete transcript of all of the record and proceedings in this case be certified to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 31 day of July, 1913.

R. S. BEAN,
Judge of the United States District
Court for the District of Oregon.

[Endorsed]: Order Allowing Appeal. Filed Jul. 31, 1913.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 31 day of July, 1913, there was duly filed in said Court, Assignments of Error, in words and figures as follows, to wit:

[Assignments of Error.]

(Title.)

Now, on this 31st day of July, 1913, comes the Complainant, Christian Herrmann, by his solicitors, Robert J. Upton and Henry St. Raynor, and says that there is manifest error on the face of the record in the above entitled suit and that the memorandum opinion

filed herein on the 3rd of February, 1913, is erroneous, and that the decree made and entered in said suit on the 17th of February, 1913, is erroneous, and unjust to Complainant, and the Complainant hereby assigns the same as error herein, for the following reasons:

I.

Because the Court erred in finding and decreeing that John F. Hall, as agent for the Complainant, Christian Herrmann, and Dora Norman Herrmann, his wife, now deceased, entered into a contract to sell the land in question to Henry Sengstacken and L. D. Smith on the 17th of May, 1905, for the following reasons:

1. The defendants introduced no written instrument whatever evidencing such alleged contract, as required by the provisions of Lord's Oregon Laws, Sections 804 and 808, in such transactions.

2. Defendants introduced no secondary evidence showing what the terms, provisions or conditions of said alleged contract were, which contract they claimed to have been set forth and contained in the receipt which they say was given for the note for \$100 given by Sengstacken and Smith to Hall to bind the bargain, and which they testified had become lost before the date of trial, and they introduced no evidence showing that such contract or receipt had been signed by the parties to be charged, complainant and his wife, or by their attorney in fact, John F. Hall.

3. The evidence in the case shows conclusively that Hall, as attorney in fact for complainant and

Dora Herrmann, entered into no contract whatever, either oral or written, with Sengstacken and Smith on May 17th, 1905, to sell said property.

II.

Because the Court erred in finding and decreeing first, that John F. Hall's duty as agent to his principals ceased upon the execution of the above mentioned contract with Sengstacken and Smith, on the 17th of May, 1905, and that he could thereafter, and before the execution and delivery of the deed of said property to the Title Guarantee & Abstract Company, trustee, on August 31st, acquire an interest therein, without the knowledge and consent of his principals; and, second, in finding and decreeing that such act on the part of John F. Hall did not affect the alleged interests of his associates and partners in the deal, Henry Sengstacken, James T. Hall, L. D. Smith, J. J. Clinkinbeard, S. C. Rogers and D. L. Rood, for the following reasons:

1. There is no evidence in the case showing that a binding or valid contract had been entered into to sell said property to Sengstacken and Smith on said 17th of May, 1905, as asserted in the opinion, as above mentioned.

2. As a matter of fact and law, if there had been a valid binding contract to sell this land made and entered into on said 17th of May, 1905, the relation of principal and agent, would not have been terminated between the Herrmanns and John F. Hall at that time. The relationship would not have terminated,

under the law, until the execution and delivery of the deed to the Title Guarantee & Abstract Company, trustee, on the 31st of August, 1905, and until all things pertaining to the transfer of the property, and for which said agent had been employed, had been performed and completed. And it was a violation of his duty as agent for John F. Hall to acquire any interest whatever, either directly or indirectly, in the subject matter of this agency while the agency continued to exist, without disclosing the facts to his principals; and his act in purchasing an undivided joint interest with Henry Sengstacken, L. D. Smith, J. J. Clinkinbeard, S. C. Rogers, James T. Hall, and D. L. Rood, in such property, while so acting as agent for the grantors, invalidated the transaction, and the same was void, not only as to John F. Hall himself, but as to his associates and partners in the deal as well, and as to all persons claiming by, through or under them with notice of the facts.

III.

Because the Court erred in holding and decreeing that none of the parties interested in the purchase of this land, except Henry Sengstacken, had any knowledge of the fact that John F. Hall, the agent, had acquired an undivided joint interest in the land with them, while acting as agent for the sale and conveyance of the same, and that consequently his unlawful act could not affect their alleged rights, for the following reasons:

1. The defendants expressly alleged in their first

Answer filed herein, and which Complainant introduced in evidence, and it was admitted by them, that both Sengstacken and Smith, who together now own 11/12ths of the stock of the East Side Land Company, a corporation which they organized for the purpose of taking over the title of this land from the Title Guarantee & Abstract Company, trustee, and which corporation now holds the legal title of said land, and of which they are, and have been since its organization, the officers and directors, requested John F. Hall to take his undivided interest in said land jointly with them.

2. Notice to one partner in a transaction is notice to all. And the fact that Sengstacken had notice of John F. Hall's act was therefore notice to the other members of the association or partnership, which they formed for the purpose of buying this land.

3. Henry Sengstacken was the agent of the other members of the association in promoting and attending to the carrying out of the transaction, and notice to him was therefore notice to all the members of the association.

4. The evidence shows that the Title, Guarantee & Abstract Company, to which company the deed conveying the property in dispute was executed, to hold in trust for said members of said association or partnership, and which was their agent and trustee for the purpose of receiving and holding the title to the land for them, had knowledge of the fact that John F. Hall was one of the members of the associa-

tion and a purchaser of an undivided joint interest in the property with the other members of the association, Henry Sengstacken, L. D. Smith, J. J. Clinkinbeard, S. C. Rogers, James T. Hall, and D. L. Rood; for Henry Sengstacken was the President and General Manager of the Title, Guarantee & Abstract Company at the time of the transaction, and his knowledge was the knowledge of said company, under the law, and the knowledge of the company was the knowledge of its cestui que trustants, Henry Sengstacken, L. D. Smith, J. J. Clinkinbeard, S. C. Rogers, James T. Hall, D. L. Rood and John F. Hall.

5. The law will not permit a party to claim that he is an innocent purchaser when he permits an agent to share with him as purchaser in the sale of his principal's property.

IV.

Because the Court erred in dismissing Complainant's bill of complaint, and in not decreeing to Complainant the relief prayed for therein, for the following reasons:

1. Because the evidence shows that John F. Hall purchased and acquired an undivided interest jointly with Henry Sengstacken, L. D. Smith, J. J. Clinkinbeard, S. C. Rogers, James T. Hall and D. L. Rood, in the property of his principals, Dora Norman Herrmann and the complainant, while acting as their agent for the sale and conveyance of the same, without disclosing said facts to them and without their knowledge and consent, on the 31st of August, 1905; and

that by reason thereof, the pretended sale and conveyance of said property by Hall, as agent, to said association or partnership, of which he was a member, was in violation of his duties to his principals, and void as to all the parties involved in said transaction.

2. And that the East Side Land Company, a corporation, the present holder of the legal title of said land, acquired said title from the Title Guarantee & Abstract Company, the trustee for said Henry Sengstacken, L. D. Smith, J. J. Clinkinbeard, S. C. Rogers, D. L. Rood, John F. Hall, and James T. Hall, without paying any consideration therefor, and with notice and knowledge of the foregoing facts concerning the execution of the conveyance aforesaid to said Title, Guarantee & Abstract Company, Trustee, by Hall, on the 31st of August, 1905, and of the fact of Hall's interest in that sale; and that by reason thereof, said East Side Land Company is not an innocent purchaser or holder of the title of said property.

V.

Because the Court erred in not holding and decreeing that the sale of said land by said John F. Hall, as attorney in fact for said complainant and his wife aforesaid, to the Title, Guarantee & Abstract Company, in trust for said Henry Sengstacken, L. D. Smith, J. J. Clinkinbeard, S. C. Rogers, D. L. Rood, John F. Hall, and James T. Hall, was void, for the following reasons:

1. The evidence shows that John F. Hall, while acting as the agent for the sale and conveyance of

said land for complainant, Christian Herrmann, and his wife, Dora Norman Herrmann, acquired an undivided joint interest therein with said purchasers, without disclosing the facts to his said principals and without their knowledge or consent.

VI.

Because the Court erred in not holding and decreeing that no valid contract for the sale of said land had been entered into by John F. Hall, as agent for the Herrmanns, on the 17th of May, 1905, with Sengstacken and Smith, for the following reasons:

1. Defendants failed to adduce any written instrument evidencing said alleged contract, as required by the provisions of Lord's Oregon Laws, Sections 804, 808.

VII.

Because the Court erred in not holding and decreeing that, even though there had been a valid and binding contract to sell entered into by John F. Hall, as attorney in fact for the Herrmanns, with Sengstacken and Smith on the 17th of May, 1905, as claimed by Defendants, yet, nevertheless, John F. Hall, as agent, violated his duty to his principals in agreeing to purchase a joint interest with Henry Sengstacken, L. D. Smith, J. J. Clinkinbeard, S. C. Rogers, James T. Hall, and D. L. Rood, in the lands of his principals after said time and before the execution and delivery of the deed, which he executed as attorney in fact, to the Title Guarantee & Abstract Company, trustee, for him and his associates; and

said transaction is void for the following reasons:

1. Because, if there had been a valid and binding contract entered into on the 17th of May, 1905, to sell said land, as claimed by defendants, yet, nevertheless, the relation of principal and agent between the Herrmanns and Hall did not terminate at that time. The relationship did not terminate until the final execution and delivery of the deed to the land to the Title, Guarantee & Abstract Company, trustee, on August 31st, 1905, and it was a violation of Hall's duty as agent to enter into an agreement whereby he was to acquire an interest in said land during the existence of said agency, without disclosing the facts to his principals. The transaction is invalid both as to Hall and as to his associates and partners in the transaction.

VIII.

Because the Court erred in not finding and decreeing that the sale and conveyance of the said land to the Title, Guarantee & Abstract Company, as trustee for Sengstacken, Smith, Clinkinbeard, Rogers, Rood, Hall and Hall, was invalid for the following reasons:

1. Because John F. Hall before the conveyance of said land agreed to purchase and did acquire an undivided joint interest with Henry Sengstacken, L. D. Smith, J. J. Clinkinbeard, S. C. Rogers, James T. Hall, and D. L. Rood, without disclosing such facts to his principals, and without their knowledge or consent.

IX.

Because the Court erred in not holding and de cree-

ing that the East Side Land Company has no right, title or interest in or to said land, for the following reasons:

1. The evidence shows that Sengstacken and Smith organized said Company to take the title to said land, and at the time of its incorporation were, and now are officers and directors thereof; that said company did not pay any consideration for said land, and had full notice and knowledge that Hall, while acting as said agent for the complainant and his wife, had reserved and acquired said undivided interest in said land.

X.

Because the Court erred in not holding and decreeing that L. D. Smith, J. J. Clinkinbeard, S. C. Rogers, James T. Hall and D. L. Rood, had notice and knowledge that John F. Hall, while acting as said agent of complainant and his wife, and before the execution and delivery of said deed to the Title Guarantee & Abstract Company, trustee, on the 31st of August, 1905, agreed to purchase and acquire an undivided joint interest in said land with Henry Sengstacken, L. D. Smith, J. J. Clinkinbeard, S. C. Rogers, James T. Hall, and D. L. Rood, for the following reasons:

1. The defendants specifically allege in their first Answer herein that Sengstacken and Smith requested John F. Hall to take an undivided joint interest in said land with them.

2. The evidence shows that Sengstacken and Smith were acting as agents for J. J. Clinkinbeard, S.

C. Rogers, and D. L. Rood, in promoting and negotiating said transaction; and that, therefore, the knowledge of Sengstacken and Smith was knowledge of and notice to their said associates and partners.

3. The evidence shows that Sengstacken and Smith were partners and associated with J. J. Clinkinbeard, S. C. Rogers and D. L. Rood, in the joint purchase of said land, and the knowledge of Sengstacken and Smith of the unlawful act of Hall while acting as agent for complainant and his wife in purchasing and acquiring an undivided joint interest with them in said land was the knowledge of and notice to said associates and partners.

4. The evidence shows that the Title, Guarantee & Abstract Company, to which company the deed conveying the property in dispute was executed, as trustee for said purchasers, and which was their agent for the purpose of receiving and holding the title to the land for them, as trustee, had knowledge of the fact that John F. Hall was one of the members of the association and a purchaser of a joint undivided interest in the property with the other members of the association; for Henry Sengstacken was the President and General Manager of that company at the time of the transaction, and his knowledge was the knowledge of the company, and the knowledge of the company was the knowledge of its cestui que trustants, Henry Sengstacken, L. D. Smith, J. J. Clinkinbeard, S. C. Rogers, D. L. Rood, James T. Hall, and John F. Hall, under the law.

5. A party who permits an agent to share with him in the purchase of his principal's property cannot claim to be an innocent purchaser, under the law.

XI.

Because the Court erred in not holding and decreeing that W. O. Christensen, to whom John F. Hall and James T. Hall, assigned their certificate of interest in said association and property, and who subsequently sold and assigned said certificate to Henry Sengstacken, and that Z. T. Siglin, to whom L. D. Smith and Henry Sengstacken sold and assigned the certificate evidencing the interest of D. L. Rood in said association, the interest of said D. L. Rood in said association, having theretofore been purchased by Henry Sengstacken and L. D. Smith, had notice and knowledge of the unlawful act of John F. Hall, as agent, as aforesaid, in acquiring an undivided joint interest in the purchase of his principals property, without their knowledge and consent, as above set forth, and that said Christensen and Siglin are not innocent purchasers of said undivided interest, for the following reasons:

1. That during all of said time, the legal title of said property was acquired and held by the Title Guarantee & Abstract Company, as trustee, for all of said parties; that Henry Sengstacken was president and general manager of said company, and had notice of all of the above facts; that the knowledge of Henry Sengstacken was the knowledge of the Company, and the knowledge of the Company, was the knowledge of

its said cestui que trustants.

XII.

Because the Court erred in failing to and not finding and decreeing for the complainant the relief prayed for in his bill of complaint herein for the reason the evidence shows that John F. Hall, while acting as the attorney in fact for complainant and his wife, Dora Norman Herrmann, and during the continuance of his agency to sell and convey said real property, on the 31st of August, 1905, made a pretended sale and conveyance of said property to the Title Guarantee & Abstract Company, whereas in fact, it was a sale and conveyance under their express agreement to be held by said company in trust for said John F. Hall, James T. Hall, Henry Sengstacken, L. D. Smith, J. J. Clinkinbeard, S. C. Rogers and D. L. Rood, in joint undivided interests, without the knowledge or consent of complainant or his wife aforesaid; that thereafter said Sengstacken, acting as President of said company, to carry out said agreement, executed and delivered to said John F. Hall, James T. Hall, L. D. Smith, J. J. Clinkinbeard, S. C. Rogers, Henry Sengstacken and D. L. Rood, certificates representing and conveying to them their said respective undivided joint interests in said property; that each and every of said parties, together with the Eastside Land Company, to whom they subsequently conveyed the same, had notice and knowledge of said facts in fact and law, and are impressed therewith; and that therefore said transactions were and are contrary to law

and public policy as being in derogation of the duty of agency under which the said John F. Hall was acting for complainant and his said wife, and void as to all of said parties.

WHEREFORE, the complainant prays that the said decree be reversed, and that the Honorable, The District Court of the United States for the District of Oregon be directed to enter such decree as is prayed for in the bill of complaint herein, or that the Honorable the United States Circuit Court of Appeals for the Ninth Circuit shall reverse said decree and render a proper decree on the record, and a judgment for his costs and disbursements herein.

HENRY ST. RAYNOR,
ROBERT J. UPTON,
Solicitors for Complainant.

[Endorsed]: Assignment of Errors. Filed Jul. 31, 1913.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 5 day of August, 1913, there was duly filed in said Court, a Bond on Appeal, in words and figures as follows, to wit:

[Bond on Appeal.]
(Title.)

KNOW ALL MEN BY THESE PRESENTS, That we, Christian Herrmann, as principal and Ray Barkhurst and Lucy Hargrove as sureties, are held and firmly bound unto John F. Hall, Mary Hall, his

wife, L. D. Smith, Rosa M. Smith, his wife, Henry Sengstacken, Agnes R. Sengstacken, his wife, Z. T. Siglin, J. J. Clinkinbeard, Philura Clinkinbeard, his wife, S. C. Rogers, Delia M. Rogers, his wife, D. L. Rood, Ella M. Rood, his wife, James T. Hall, Alice Hall, his wife, William O. Christensen, Mattie Christensen, his wife, Title Guarantee and Abstract Company, a corporation, trustee, Title Guarantee and Abstract Company, a corporation, East Marshfield Land Company, a corporation, Eastside Land Company, a corporation, Andrew Masters, Charles H. Curtis, Anna Johansen, John Wall, Mary Pennock, Arthur B. Sandohl, W. R. Haines and Louise B. Haines, Harvey Smith, George Clinkinbeard, Anna D. Clinkinbeard, Chapman L. Pennock, Arne P. Husby, A. E. Cavanaugh, M. A. McLaggen and Minnie McLaggen, First Trust and Savings Bank of Coos Bay, a corporation, J. W. Vingard, Mary A. Peterson, Doris L. Sengstacken, Victor Alto, L. Grayce Gould, Cornelius Woodruff, William J. Leaton, John F. Bane, A. W. Neal, A. R. Welch, William Vaughn, William H. Payne, Hilda Frederickson, Elizabeth Schieffele, Anthony Stambuck, George H. Elliott, Nellie Chandler, T. V. Johnson, Lisi Alto, J. T. Herrett, in the sum of Five Hundred (\$500.00) Dollars to be paid to the said John F. Hall, Mary Hall, his wife, L. D. Smith, Rosa M. Smith, his wife, Henry Sengstacken, Agnes R. Sengstacken, his wife, Z. T. Siglin, J. J. Clinkinbeard, Philura Clinkinbeard, his wife, S. C. Rogers, Delia M. Rogers, his wife, D. L. Rood, Ella

M. Rood, his wife, James T. Hall, Alice Hall, his wife, William O. Christensen, Mattle Christensen, his wife, Title Guarantee and Abstract Company, a corporation, trustee, Title Guarantee and Abstract Company, a corporation, East Marshfield Land Company, a corporation, Eastside Land Company, a corporation, Andrew Masters, Charles H. Curtis, Anna Johansen, John Wall, Mary Pennock, Arthur B. Sandohl, W. R. Haines and Louise B. Haines, Harvey Smith, George Clinkinbeard, Anna D. Clinkinbeard, Chapman L. Pennock, Arne P. Husby, A. E. Cavanagh, M. A. McLaggen and Minnie McLaggen, First Trust and Savings Bank of Coos Bay, a corporation, J. W. Vingard, Mary A. Peterson, Doris L. Sengstacken, Victor Alto, L. Grayce Gould, Cornelius Woodruff, William J. Leaton, John F. Bane, A. W. Neal, A. R. Welch, William Vaughn, William H. Payne, Hilda Frederickkson, Elizabeth Schieffele, Anthony Stambuck, George H. Elliot, Nellie Chandler, T. V. Johnson, Lisi Alto, J. T. Herrett, their executors, administrators, successors or assigns, to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors and administrators firmly by these presents.

Sealed with our seals and dated 2nd day of August, 1913.

Whereas the above named Christian Herrmann, complainant has appealed to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the

decree in the above entitled cause, made and entered by the District Court of the United States, for the District of Oregon.

Now, therefore, the condition of this obligation is such, that if the above named Christian Herrmann shall prosecute his appeal to effect and answer all costs, if he shall fail to make his plea good, then this obligation shall be void; otherwise to remain in full force and virtue.

CHRISTIAN HERRMANN.

By ROBT. J. UPTON. (Seal)
of his Solicitors.

RAY BARKHURST. (Seal)

LUCY HARGROVE. (Seal)

Signed, Sealed and delivered in the presence of

E. M. HALL.

[Endorsed]: Bond on Appeal. Filed Aug. 5, 1913.

A. M. CANNON,

Clerk U. S. District Court.

And afterwards, to wit, on the 15 day of August, 1913, there was duly filed in said Court, a Citation on Appeal, in words and figures as follows, to wit:

[Citation on Appeal.]

UNITED STATES OF AMERICA,

District of Oregon.—ss.

To John F. Hall, Hary Hall, L. D. Smith, Rosa M. Smith, Henry Sengstacken, Agnes R. Sengstacken, Z. T. Siglin, J. J. Clinkinbeard, Philura Clinkinbeard, S. C. Rogers, Delia M. Rogers, D. L. Rood, Ella M.

Rood, James T. Hall, Alice Hall, William O. Christensen and Mattie Christensen, Title Guarantee & Abstract Company, a corporation, Trustee, Title Guarantee & Abstract Company, a corporation, and Eastside Land Company, and East Marshfield Land Company, a corporation; Greeting:

YOU ARE HEREBY NOTIFIED That in a certain case in equity in the United States District Court in and for the District of Oregon, wherein Christian Herrmann is Complainant and John F. Hall, Mary Hall, his wife, L. D. Smith, Rosa M. Smith, his wife, Henry Sengstacken, Agnes R. Sengstacken, his wife, Z. T. Siglin,, J. J. Clinkinbeard, Philura Clinkinbeard, his wife, S. C. Rogers, Delia M. Rogers, his wife, D. L. Rood, Ella M. Rood, his wife, James T. Hall, Alice Hall, his wife, William O. Christensen, Mattie Christensen, his wife, Title Guarantee and Abstract Company, a corporation, trustee, Title Guarantee and Abstract Company, a corporation, East Marshfield Land Company, a corporation, Eastside Land Company, a corporation, Andrew Masters, Charles H. Curtis, Anna Johansen, John Wall, Mary Pennock, Arthur B. Sandohl, W. R. Haines and Louise B. Haines, Harvey Smith, George Clinkinbeard, Anna D. Clinkinbeard, Chapman L. Pennock, Arne P. Husby, A. E. Cavanaugh, M. A. McLaggen and Minnie McLaggen, First Trust and Savings Bank of Coos Bay, a corporation, J. W. Vingard, Mary A. Peterson, Derris L. Sengstacken, Victor Alto, L. Grayce Gould, Cornelius Woodruff, William J. Leaton, John F.

Bane, A. W. Neal, A. R. Welch, William Vaughn, William H. Payne, Hilda Frederickson, Elizabeth Schieffele, Anthony Stambuck, George H. Elliot, Nellie Chandler, T. V. Johnson, Lisi Alto, J. T. Herrett, are Defendants, an appeal has been allowed the Complainant therein to the United States Circuit Court of Appeals for the Ninth Circuit.

You are hereby cited and admonished to be and appear in said Court at San Francisco, California, within thirty days from date hereof, to show cause, if any there be, why the decree appealed from should not be corrected and speedy justice done the parties in that behalf.

Witness, the Hon. R. S. Bean, Judge of the United States District Court for the District of Oregon, this 5th day of August A. D. 1913.

R. S. BEAN,

United States District Judge.

UNITED STATES OF AMERICA,

District of Oregon,—ss.

Due service of the within citation on appeal by certified copy thereof, as required by law, is hereby acknowledged at Marshfield, Oregon, this 11th day of August, 1913.

CASSIUS R. PECK,

H. W. DOUGLAS,

Solicitors for Appellees.

[Endorsed]: Citation on Appeal. Filed Aug. 15, 1913.

A. M. CANNON,

Clerk U. S. District Court.

And afterwards, to wit, on, the 21 day of August, 1913, the same being the Judicial day of the Regular July 1913 Term of said Court; Present: the Honorable R. S. BEAN, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

[Order Enlarging Time to File Record.]

(Title.)

August 21, 1913.

Now, at this day, for good cause shown, it is Ordered that complainant's time for filing and docketing the record in the above entitled cause, in the United States Circuit Court of Appeals, Ninth Circuit, be and the same hereby is extended sixty days from the 30th day of August, 1913.

R. S. BEAN,
Judge.

And afterwards, to wit, on the 22 day of October, 1913, the same being the Judicial day of the Regular July 1913 Term of said Court; Present: the Honorable R. S. BEAN, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

[Order Enlarging Time to File Record.]

(Title.)

Now, at this day, for good cause shown, it is ordered that the time within which the complainant above named is required to docket this cause and file

the transcript of the record thereof in The United States Circuit Court of Appeals for the Ninth Circuit upon appeal of the said complainant from the final decree entered herein, be and the same is hereby extended thirty days from the 30th day of October, 1913.

Done by the Court at Portland, Oregon, this 22nd day of October, 1913.

R. S. BEAN,
District Judge.

And afterwards, to wit, on the 28th day of November, 1913, the same being the Judicial day of the Regular November 1913 Term of said Court: Present: the Honorable CHAS. E. WOLVERTON, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

[Order Enlarging Time to File Record.]

(Title.)

November 28, 1913.

Now, at this day, for good cause shown, it is Ordered that Complainant's time for filing the record and docketing this cause on appeal, in the United States Circuit Court of Appeals for the Ninth Circuit, be and the same hereby, extended sixty days from the 28th day of November, 1913.

CHAS. E. WOLVERTON,
Judge.

No. 2371

IN THE
**United States Circuit
Court of Appeals**

NINTH CIRCUIT

CHRISTIAN HERRMANN,
Appellant

vs.

JOHN F. HALL, et al,
Appellees

Appeal from the District Court of the United States
for the District of Oregon

Appellant's Brief

ROBERT J. UPTON,
Fenton Building, Portland, Oregon

ST. RAYNER & ST. RAYNER,
Chamber of Commerce Building, Portland, Oregon
Solicitors for Appellant

No. 2371

IN THE
United States Circuit Court
of Appeals

NINTH CIRCUIT

CHRISTIAN HERRMANN,

Appellant,

vs.

JOHN F. HALL, MARY HALL, his wife, L. D. SMITH, ROSA M. SMITH, his wife, HENRY SENGSTACKEN, AGNES R. SENGSTACKEN, his wife, Z. T. SIGLIN, J. J. CLINKINBEARD, PHILURA CLINKINBEARD, his wife, S. C. ROGERS, DELIA M. ROGERS, his wife, D. L. ROOD, ELLA M. ROOD, his wife, JAMES T. HALL, ALICE HALL, his wife, WILLIAM O. CHRISTENSEN, MATTIE CHRISTENSEN, his wife, TITLE GUARANTEE AND ABSTRACT COMPANY, a corporation, trustee, TITLE GUARANTEE AND ABSTRACT COMPANY, a corporation, EAST MARSHFIELD LAND COMPANY, a corporation, EASTSIDE LAND COMPANY, a corporation, ANDREW MASTERS, CHARLES H. CURTIS, ANNA JOHANSEN, JOHN WALL, MARY PENNOCK, ARTHUR B. SANDOHL, W. R.

HAINES and LOUISE B. HAINES, HARVEY SMITH, GEORGE CLINKINBEARD, ANNA D. CLINKINBEARD, CHAPMAN L. PENNOCK, ARNE P. HUSBY, A. E. CAVANAUGH, M. A. McLAGGEN and MINNIE McLAGGEN, FIRST TRUST AND SAVINGS BANK OF COOS BAY, a corporation, J. W. VINGARD, MARY A. PETERSON, DORIS L. SENGSTACKEN, VICTOR ALTO, L. GRAYCE GOULD, CORNELIUS WOODRUFF, WILLIAM J. LEATON, JOHN F. BANE, A. W. NEAL, A. R. WELCH, WILLIAM VAUGHN, WILLIAM H. PAYNE, HILDA FREDERICKSON, ELIZABETH SCHIEFFELE, ANTHONY STAMBUCK, GEORGE H. ELLIOT, NELLIE CHANDLER, T. V. JOHNSON, LISI ALTO, J. T. HERRETT,

Appellees.

Appeal from the District Court of the United States for the District of Oregon.

STATEMENT.

This suit was instituted by Christian Herrmann in the District Court of the United States, for the District of Oregon, for the cancellation of certain deeds; for the recovery of a certain tract of 280 acres of land, known as the "Holcomb" tract, situate in Coos County, Oregon; and for an accounting. Mr. Herrmann predicated the right of relief prayed

for on the fact that the defendant, John F. Hall, while acting as his and his wife's agent for the sale and conveyance of said land, under a general power of attorney, sold and transferred the same to a syndicate or an association of which said agent was himself a member, without their knowledge or consent. After hearing the evidence, the trial court rendered an opinion and decree dismissing complainant's Bill of Complaint, from which this appeal is taken.

The record shows that the land in question was, for many years, owned by Dora Norman, a widow.

During the year 1900, Dora Norman left her home in Marshfield, Coos County, Oregon, and went to Germany, where she made her home and resided until the time of her death, in 1905.

Previous to the time of her departure from Marshfield, Dora Norman placed the control and management of all her land and other property in Coos County, of which she owned considerable, in the hands of John F. Hall, an attorney, of Marshfield, in whom she reposed great trust and confidence, and he acted as her agent and confidential adviser in respect thereof from that time until the date of her death.

On the 8th of June, 1902, Dora Norman and appellant, Christian Herrmann, were married, in Germany.

On November 7th, 1903, Mr. and Mrs. Hermann made and delivered a general power of attorney to Hall, whereby they formally appointed him their agent, and duly authorized and empowered him to sell and convey their lands, etc., for them, and to make, execute and deliver deeds, etc., therefor, in their names, places and stead. ("Exhibit A," T., p. 31.)

Mrs. Herrmann was desirous of disposing of the land in question herein, and she directed Hall, in her letters, to sell it for her. Considerable correspondence passed between them in regard thereto, from the time Mrs. Herrmann went to Germany until the land was conveyed by Hall, in 1905, and the history of this case, in so far as the part played by Mrs. Herrmann and Hall is concerned, is mostly contained in the letters that passed between them during that time.

The first letter in which Hall informed Mrs. Herrmann that he had a prospect of selling the land was dated May 19th, 1905. He wrote (T., p. 220, 221):

"Hall & Hall,
Attorneys at Law,
Marshfield, Oregon.

May 19, 1905.

Dora Herrmann,
Tedan Street, Hildesheim,
Hanover, Germany.

Dear Madam:

* * *
 “ * * * There is now considerable talk
 about land and we have a good prospect of
 selling the Holcomb tract for four thousand
 dollars. * * * ”

“HALL & HALL.”

Mrs. Hermann replied to this letter on June 12,
 1905, as follows (T., p. 222-223):

“Mr. John Hall,

Marshfield.

June 12, 1905.

* * *

“I am also satisfied with the sale of the
 Holcomb land for four thousand dollars. You
 would really oblige me very much if you would
 apply to the affair very energetically, that now
 at length all my possessions there would be sold.

* * * ”

“ * * * I am looking forward to an
 answer soon. *Please do give me a detailed ac-*
count about everything. * * * ”

* * *

“DORA HERRMANN.”

Again, on August 12, 1905, Hall addressed the
 following letter to Mrs. Herrmann (T., p. 91-92):

“Hall & Hall,

Attorneys at Law,

Marshfield, Oregon.

August 12, 1905.

Dora Herrmann, 16 Tedanstrasje,
Hildesheim, Germany.

Dear Madam:

* * *

“ * * * The Holcomb claim, I guess, is sold. Parties have agreed to take the same, and the abstract is now being made, and unless the parties go back on the bargain, we will be able to close the deal about the 1st of September.”

* * *

“HALL & HALL.”

On August 31, 1905, Mr. Hall next wrote Mrs. Herrmann, notifying her that he had sold the Holcomb tract, as follows (T., p. 90):

“Dora Herrmann,
Hildesheim, Germany.

August 31, 1905.

Dear Madame:

“Enclosed herewith find check for the sum of \$1694.00. We have sold the Holcomb land for \$4000.00 net above commission, and our fee for foreclosing the mortgage. Have taken a mortgage for \$2200.00, payable one year after date, at 6% per annum. Will take payments against that and all other property, together at any time for \$100.00 and upwards.

“We retain a sufficient sum to pay the taxes with the cost of abstract, and remit the balance received herewith. * * * ”

* * *

“HALL & HALL.”

On September 18, 1905, Mrs. Herrmann died intestate, leaving her husband, Christian Herrmann, complainant herein, her sole heir at law, and he thereupon became the owner of all her rights, title and interest in and to the land in question herein. (T., p. 126.)

The last two mentioned letters of Hall were received by Mr. Herrmann on the day of his wife's death, or immediately thereafter. And after that time, Herrmann and Hall continued the correspondence in regard to this property.

On October 8, 1905, Hall wrote Mrs. Herrmann (not yet having learned of her death) as follows (T., p. 95):

"Dora Herrmann,

Dear Madam:

"Herewith you receive a check for the sum of \$370.00, as payment on account of the Holcomb property and mortgage to examine.

* * * "

* * *

"HALL & HALL."

Mr. Herrmann testified at the trial in the court below that, although this letter recited that it contained "a mortgage to examine," it did not in fact contain any mortgage. (T., p. 95.)

On November 8, 1905, Herrmann replied to all of Hall's letters, notifying him of his wife's death,

and expressing his confidence and reliance in Hall, as follows (T., p. 93-94):

“Hildesheim, the 8th November, 1905.

Mr. John Hall, Marshfield.

“I received all your writings from the 12th and 31st August, also those from 28th and 29th September, 1905. Let me first tell you of the very sad eventment that took place in the month of September. My dear wife was not more able to answer your writings; she became suddenly ill, suffered a whole month from heart disease. * * * She died in September. * * * *My whole confidence belongs to you, sir*, just as it was with my wife, and I declare that I am entirely satisfied with all you did in arranging affairs. * * * I am very satisfied also concerning the Holcomb claim that it is sold. * * * ”

* * *

“CHRISTIAN HERRMANN.”

All Mr. Herrmann's letters were written with the aid of an interpreter.)

Hall again wrote on November 28, 1905. He made but brief reference, however, to the Holcomb land. His letter reads (T., p. 96):

“November 28, 1905.

Mr. Christian Herrmann:

“I have received your letter of November 8th and am very sorry to hear of the death of your

dear wife and extend my sincerest sympathy in your bereavement. * * * Then you have yet of the accounts of the Holcomb land mortgage about \$1800.00. * * * ”

* * *

“HALL & HALL.”

Hall had not stated, in any of his letters, to whom he had sold the land in question, nor any of the facts concerning the transaction. Herrmann, being desirous of knowing what had been done with the property, therefore, thereafter wrote Hall the following letter (T., p. 223-226):

“Dear Sir:

“I received your letter of the 28th November (1905) and thank you very much for all the sympathy you take in my bereavement, also for all the explanations you give about the property left to me by my dear wife. * * * ”

* * *

“ * * * *Would you send me a copy of the contracts over the sales of the Holcomb land and the Blanco property certified by the Clerk of the Court?*

* * *

“CH. HERRMANN.”

And again, in January, 1906, Hermann wrote Hall, requesting the latter to give him information concerning the sale of the Holcomb land. He wrote (T., p. 98-100):

“Hildesheim, January —, 1906.

Mr. John Hall, Marshfield, Oregon.

Dear Sir:

“In possession of your esteemed letter of 28 November I first express to you my best thanks for your explicit information.”

* * *

“Naturally you must know what is necessary to represent my interests and *I therefore place my whole confidence at your command.*

* * * ”

“*You will oblige me very much if you always would give me a clear report over everything, as I do not understand conditions and customs there at all, and it is very hard to find my way and to express myself when you send me to (too) short abbreviated reports (statements).* * * * ”

“ * * * Pray for more explicit reports to give me some kind of a clear view point of the conditions existing. *I kindly ask you to send me a sworn affidavit of the contracts concerning the sale of the Holcomb lands.* * * * ”

* * *

“CHRS. HERRMANN.”

On February 19, 1906, Hall replied, but did not give the requested information (T., p. 100):

“February 19, 1906.

Mr. Christian Herrmann:”

* * *

“ * * * Our probate requirements of the

estate concerning the Holcomb property contracts are hereto attached. We attach hereto a copy of the accounts together with endorsements of the same. * * * ”

The only instruments “attached” to this letter were: A copy of a promissory note of the Title Guaranty & Abstract Co. and a purported statement of account. (T., p. 104.)

Both Mrs. Herrmann, during her life time, and Mr. Herrmann repeatedly requested Hall to give them specific information concerning the sale of the Holcomb land. But Hall studiously avoided giving them any information whatever in regard thereto, other than mere vague statements to the effect that he had sold it for forty-four hundred dollars, of which one-half was paid in cash and the balance secured by a mortgage due in one year. He never sent them copies of the deed, mortgage or contracts, as requested (T., p. 142), nor did he disclose to them, in any way, any of the facts or circumstances whatever concerning the transaction, other than as indicated. He never gave them even a hint as to who the real purchasers of the tract were. (T., p. 249, et seq.) And neither Mr. nor Mrs. Herrmann ever learned, either from Hall or from any other source who the purchasers of it were, nor the facts concerning the sale, until about the year 1911, after Hermann came to the United States, and instituted an inquiry, as will be shown hereinafter. (T., p. 143, et seq.)

After the note and mortgage, which had been given to secure the deferred payment of one-half the purchase price of the land, became due, Hall wrote Herrmann various excuses for its non-payment. On October 18, 1907, more than a year after the maturity of the obligation, Hall wrote that it had not been paid because there was some kind of "a defect" in the title, and that the mortgagor, therefore, refused to pay. (T., p. 109-110.) About five months later, Hall again wrote that he had threatened the owners of the land with suit unless they paid the mortgage, and further stated: "But we have settled by agreeing to allow \$250.00 on the interest." (T., p. 111.) And two months thereafter, on November 14, 1908, he gave Herrmann a new excuse. He wrote: "The land which the mortgage covers is now under litigation before the U. S. Land Department, and we can do nothing until this matter is settled. We have everything prepared for foreclosure, but there is an attempt made by a party to file a homestead claim on the land. The party who is filing the claim says that the land still belongs to the Government and is contesting the rights of the other claimants. We will hurry the matter up as fast as we can but presume you understand that anything in the hands of the Government Agents moves very slowly, and we can do nothing until after the litigation is settled." (T., p. 114.) And that was the last that Herrmann heard from Hall in regard to the payment of this mortgage.

During the month of March, 1909, Herrmann, for the first time, came to this country from Germany, and in April of the same year he arrived in Marshfield, Oregon. (T., p. 116.) He emigrated from Germany with the intent of making his future home in the United States. At the time of his arrival, he was ignorant of the English language, and knew nothing about the laws or customs of this country or concerning our methods or manner of doing business. In fact, he knew but very little about business affairs of any kind. He had the utmost confidence in his agent, Hall, and relied implicitly on everything that Hall told him regarding his property and business affairs, and trusted him in everything that he did, practically without question, both before he came to this country and for a long time thereafter—until he became more familiar with our language and was able to communicate with other people, and until he became a little better acquainted with Hall. (T., p. 124, et seq.; T., p. 129, et seq.)

After coming to Marshfield, Herrmann made various efforts to obtain a statement from Hall concerning his property and affairs, but with little success. Finally, during the early part of the year 1911, he sent a Mr. Reigard, an attorney, of Marshfield, to Hall, for the purpose of demanding a final statement and settlement. (T., p. 116.) And, in response thereto, in May or June, 1911, Hall gave Herrmann what purported to be a statement of all his affairs, dating from January 1, 1905, up to and

including February 4, 1910, a copy of which is set forth in full in the Transcript herein, on page 117, marked "Plaintiff's Exhibit 15."

Herrmann was not satisfied with this statement, for the reason that it was not sufficiently definite and because it contained no account of nor reference to the matter of the sale of the Holcomb tract. He, therefore, demanded another statement. And, in response thereto, Hall, on the 23d of June, 1911, gave him a second report, dating from the 1st of August, 1905, up to and including the 7th of November of the same year, a copy of which is set forth in full in the Transcript on page 119, marked "Plaintiff's Exhibit 16."

In examining the second statement, Hermann's attention was attracted and his curiosity aroused by the following very cunningly worded item, and it was from this that he received his first intimation as to whom Hall had sold the Holcomb tract, and of Hall's duplicity, to-wit:

* * *	1905	Aug. 1.....	\$
		"	
		" 4.....	
		"	
		" 16.....	
		"	
		" J. J. Clinkinbeard..	366.65
		" S. C. Rogers.....	366.65
		" Others.....	1,466.70
		Sept. 1.....	
		" 26.....	

The meaning this innocent appearing little item conveyed to Herrmann is best related in his own

language, in his testimony given before the trial court, as follows (T., p. 120, et seq.):

Q. I notice in here, Mr. Herrmann, in this Plaintiff's Exhibit 16, a statement of J. J. Clinkinbeard, \$336.65, S. C. Rogers \$336.65, and the word "*others*" \$1466.70. Did Mr. Hall ever explain to you what these items meant?

A. No, never.

Q. Did you understand, or were you ever given any information as to what they meant?

A. No.

Q. And what time was it you received Plaintiff's Exhibit 16?

A. In June, 1911.

* * *

Q. And then after the Exhibit 16 was received by you, how long was it until you got the affidavit from Mr. Clinkinbeard that is in evidence?

A. I must explain you bye and bye. I cannot tell you the date.

Q. No, you can explain to the court now.

A. After I found the Clinkinbeard \$366.65, Rogers \$366.65, and *others* \$1466.70, I don't know what it is; I never got money under those names, and then I figure out. I found the sum

of \$2200 that they had paid me in cash for this Holcomb land.

Q. What do you mean by this \$2200.00?

Court: That is what he said they paid him in cash for the Holcomb land.

A. For the Holcomb land, I got \$2200.00, that is half payment.

Q. In other words, you found that these three items in "Exhibit 16," under the head of Clinkinbeard, Rogers and "*others*," aggregated \$2200.00. Is that what you mean?

A. Yes, sir; I makes addition and find out \$2200.00, and then I make a belief that must be the same \$2200.00, that came to me from the Holcomb land. Therefore, I told Mr. Reigard to make investigation of Mr. Clinkinbeard and Mr. Rogers, what he has to do with this sum that he pay to Mr. Hall, and Mr. Reigard telephoned to both, and Mr. Rogers had no time. Mr. Clinkinbeard came into Mr. Reigard's office, and then make this affidavit.

Q. That is how you found it out?

A. Yes.

Q. And that is the first time—or what was the first time that you discovered that that was the situation in regard to whom this land had been sold by Mr. Hall?

A. After this affidavit.

The affidavit referred to by Hermann, which Reigard obtained from Clinkinbeard, reads as follows (T., p. 426):

“State of Oregon, County of Coos—ss.

“I, J. J. Clinkinbeard, being first duly sworn, on oath, depose and say that I am one of the purchasers of the 280 acres of land known as Eastside, Marshfield, further described as the northeast quarter, and lot two, and the west one-half of the southeast quarter of Section thirty-six in Township twenty-five, Range thirteen West of the Willamette Meridian, Coos County, Oregon, *jointly with* Henry Sengstacken, S. C. Rogers, L. D. Smith, D. L. Rood, *John F. Hall*; but that as I recollect I never received a deed of conveyance for the same, but it was held in trust by some other person for me. I afterwards sold all my interest in said premises to L. D. Smith for about \$2250.00 and that I now claim no interest of any kind whatever in or to said premises.

(Signed) “J. J. CLINKINBEARD.

“Subscribed and sworn to before me this 26th day of June, 1911.

(Notarial Seal.)

“CHAS. I. REIGARD,
“Notary Public for Oregon.”

The reason why Hall had never let him know who the purchasers of the Holcomb tract were was thus made clear to Herrmann. Hall himself and a little group of his friends were the purchasers.

After this discovery, the following facts were further developed:

Prior to August 31, 1905, Henry Sengstacken and L. D. Smith, friends of Hall, organized and promoted what they termed a "syndicate," for the purpose of buying this land. This syndicate or association was composed of the following persons, all of whom were residents of the little town of Marshfield and close friends of long standing, namely: Henry Sengstacken, L. D. Smith, John F. Hall, J. J. Clinkinbeard, S. C. Rogers and D. L. Rood.

On August 31, 1905, Hall, under his power of attorney, in consideration of a stated sum of \$4400.00, executed and delivered a deed of conveyance of the land to the Title Guarantee & Abstract Company, an Oregon corporation, of which Sengstacken was president and general manager, in trust for the members of the syndicate or association aforesaid. Only one-half the purchase price was subscribed and paid by the syndicate, and the Title Guarantee & Abstract Company, trustee, gave its note and mortgage for the sum of \$2200.00, payable in one year to the order of Mrs. Hermann, back to Hall, to secure the deferred payment.

The Title Guarantee & Abstract Company, trustee, thereupon issued a memorandum or certificate to each of the members of the syndicate, evidencing their respective undivided equitable interests in the land so held in trust by it for them. The company issued a certificate to Sengstacken for a three-twelfths interest, to Smith for a three-twelfths interest, to Hall for a one-twelfth interest, to Clinkinbeard for a two-twelfths interest, to Rogers for a two-twelfths interest, and to Rood for a one-twelfth interest.

Thereafter, Rogers and Rood assigned their certificates to Sengstacken. (T., p. 316.)

Hall, together with his brother and law partner, James T. Hall, to whom he had given a one-half interest in his share, assigned his certificate to one W. O. Christensen. And Christensen, in turn, also assigned to Sengstacken. (T., p. 316.)

Clinkinbeard assigned his certificate to Smith. (T., p. 279-280.)

Sengstacken thereafter re-assigned the certificate he had acquired from Rood to one Z. T. Siglin. (T., p. 316.)

Rogers and Rood received something like four times what they had paid for their interest from Sengstacken. (T., p. 341; T., p. 376.) And Clinkinbeard received a like amount from Smith. (T., p. 362.)

And thereafter, Sengstacken, Smith and Siglin, having acquired all the equitable interests of the other members of the syndicate, organized and incorporated the East Side Land Company, under the laws of Oregon, for the purpose of receiving and holding title of the land for themselves; and they assigned all their equitable interests therein to it. (T., p. 299,312. Defendants' Answer, T., p. 68.)

And after the organization of the East Side Land Company, Sengstacken, Smith and Siglin caused the Title Guarantee & Abstract Company, trustee, to convey the legal title of the land to the former company. And the East Side Land Company now claims to be the owner thereof. (T., p. 68. Defendant's Answer.)

All the stock of the East Side Land Company, at the time of its organization, was issued to Sengstacken, Smith and Siglin, and they now own and hold all the stock of said company, in the following proportions, to-wit: Sengstacken, six-twelfths thereof; Smith five-twelfths thereof, and Siglin one-twelfth thereof. (T., p. 312.) Sengstacken was elected president of the company, and the other offices were filled by Smith and Siglin.

While the Title Guarantee & Abstract Company, trustee, still held the title of the Holcomb tract, it platted and dedicated it into two townsites, which were called "East Side" and "Home Addition to East Side." And that company, and also the East

Side Land Company, after the conveyance to it, executed deeds of lots in the two townsites to the following named persons: Andrew Masters, Charles H. Curtis, Anna Johansen, John Wall, Mary Pennock, Arthur Sandohl, W. R. Haines, Louise B. Haines, Harvey Smith, George Clinkinbeard, Anna D. Clinkinbeard, Chapman L. Pennock, Arne P. Husby, A. E. Cavanaugh, M. A. McLaggen, J. W. Vingard, Mary A. Peterson, Doris L. Sengstacken, Victor Alto, L. Grayce Gould, Cornelius Woodruff, William J. Leaton, John F. Bane, A. W. Neal, A. R. Welch, William Vaughn, William H. Payne, Hilda Frederickson, Elizabeth Schieffele, Anthony Stambuck, George H. Elliot, Nellie Chandler, T. V. Johnson, Lisa Alto and J. T. Herrett.

After Mr. Herrmann became apprised of the facts above substantially related, he tendered back to the Title Guarantee & Abstract Company, trustee, the purchase price of the land, together with interest thereon, at the legal rate, from the date of the conveyance up to and including the date of tender, and demanded a reconveyance of the property. He also made similar demands on Sengstacken, Smith, Hall, Rogers, Clinkinbeard, Rood, Siglin, Christianson and James T. Hall, also upon the East Side Land Company, and also upon the above named lot claimants. All which demands were refused.

And thereafter, on the 1st of March, 1912, Mr. Herrmann filed his Bill of Complaint herein against the above named persons and corporations.

BILL OF COMPLAINT.

After setting forth the substance of the facts above related, the Bill of Complaint charges, among other things, as follows (T., p. 7):

“IX.

“Your orator further represents and alleges that during the month of August, 1905, while said Dora Herrmann was lying sick in her last illness, in her home in Germany, and totally unable to transact any business, and in a weakened mental and physical condition so that she had not sufficient strength and intelligence to understand or attend to her affairs, said defendants, John F. Hall, L. L. Smith, J. J. Clinkinbeard, D. L. Rood, Henry Sengstacken, James T. Hall, Z. T. Siglin and S. C. Rogers, confederating and conspiring together and with the said defendant Title Gurantee and Abstract Company, for the purpose of cheating and defrauding the said Dora Herrmann and depriving her of said property and acquiring the same for themselves for a grossly inadequate price, and taking advantage of the ignorance of the said Dora Herrmann, of the condition and value of the said property and the faith and confidence reposed in said defendant John F. Hall by said Dora Herrmann as her attorney in fact and legal adviser and agent, and of his intimate knowledge of her affairs, said defendants and each of them, well knowing the value of said described property and the confidential

relation which said defendant John F. Hall bore to the said Dora Herrmann as her attorney in fact and confidential adviser, fraudulently, treacherously, corruptly and wrongfully devised and concocted the wicked, fraudulent and corrupt plan and scheme, with intent to cheat, wrong and defraud the said Dora Herrmann the same for a grossly inadequate sum and value, as follows, to-wit: That the said defendant Hall should sell, as said attorney in fact, the whole of said property described in paragraph V of this Bill of Complaint to the said defendants, John F. Hall, L. D. Smith, J. J. Clinkinbeard, D. L. Rood, Henry Sengstacken, S. C. Rogers, James T. Hall and Z. T. Siglin, and for the purpose of covering up, concealing and hiding his own connection with and interest in said transaction, and to deceive said Dora Herrmann and your orator as to the real facts in connection therewith, it was further agreed by and between said defendants that the said defendant John F. Hall should convey said described property by deed to the defendant Title Guarantee and Abstract Company, trustee, and sign the names of the said Dora Herrmann and your orator thereto by their attorney in fact, the defendant John F. Hall; that the purchase price named in said deed was the sum of \$4400.00, and it was further agreed by and between said defendants that the said defendant John F. Hall was to report and represent to said Dora Herrmann and your orator that said sum of \$4400.00 was all that said property was

reasonably worth, and that the same was the full consideration that he was receiving therefor; that in truth and in fact the said defendants, John F. Hall, L. D. Smith, J. J. Clinkinbeard, D. L. Rood, Henry Sengstacken, J. J. Clinkinbeard, D. L. Rood, Henry Sengstacken, James T. Hall, Z. T. Siglin and S. C. Rogers were not to pay for said land more than \$2200.00, said payments to be made as follows: Said defendants, John F. Hall and James T. Hall, were to pay \$366.66 for a two-twelfths interest therein; said defendant L. D. Smith was to pay \$549.99 for a three-twelfths interest therein; said defendant J. J. Clinkinbeard was to pay \$366.66 for a two-twelfths interest therein; said defendant D. L. Rood was to pay \$183.33 for a one-twelfth interest therein; said Henry Sengstacken was to pay \$549.99 for a three-twelfths interest therein, and said S. C. Rogers was to pay \$183.33 for a one-twelfth interest therein; and said defendants were to share in said property, each in the proportion in which said payments above set out were to be made, and that said defendant Title Guarantee and Abstract Company was to issue to each of said defendants a trust certificate or memorandum signed by said defendant Title Guarantee and Abstract Company, certifying their interests as herein alleged."

"X.

"That pursuant to said plan and scheme so concocted and contrived by said defendants, and

with the intent to cheat, wrong and defraud said Dora Herrmann and your orator out of said property and obtain the same for a grossly inadequate sum and value, said defendant John F. Hall, without the knowledge of the said Dora Herrmann or your orator, did thereafter, on the 30th of August, 1905, make, execute and deliver to said Title Guarantee and Abstract Company, trustee, a pretended deed of conveyance, and signed the names of said Dora Herrmann and your orator thereto by John F. Hall, attorney in fact, thereby purporting and pretending to convey to said defendant Title Guarantee and Abstract Company all the above described real estate, a copy of which said deed is hereto attached, marked Exhibit "B" and hereby made a part of this Bill of Complaint, word for word, the same as if fully set out herein; that said deed was so made and executed as to entitle the same to be recorded, and the same was thereafter recorded on the first day of September, 1905, on pages 336-7 of Book 41 of Records of Deeds in the office of the County Clerk and Recorder of Conveyances of the county of Coos, State of Oregon; that all of the aforesaid defendants except the defendant John F. Hall and said James T. Hall paid to said defendant John F. Hall each his proportion of said \$2200.00, but John F. Hall, with the knowledge and consent of all of his said hereinbefore mentioned conspirators, paid nothing for his interest in said land, but in or about the month of September, 1905, said defendant John F. Hall sent a writ-

ten statement to the said Dora Herrmann in Germany, which was received by your orator after her death, falsely representing and reporting that he had sold said property to the defendant Title Guarantee and Abstract Company and had received for it the sum of \$2200.00 and a purchase money mortgage in the sum of \$2200.00 from said defendant Title Guarantee and Abstract Company as security for the payment of the remainder of said pretended purchase price of \$4400.00; that at said time the said defendant John F. Hall also sent, directed to said Dora Herrmann, the sum of \$1694.00, retaining and claiming the sum of \$506.00 from said alleged cash payment as his commission and attorney's fees for selling said property, drawing said pretended deed, and doing whatever legal work was incident to said pretended transfer, whereas in truth and in fact the said John F. Hall had assumed and pertended to sell said property to the said Title Guarantee and Abstract Company for the said Dora Herrmann and your orator, but concealed from your orator and said Dora Herrmann that the sale was for himself and the other defendants aforesaid for said grossly inadequate sum and value, and under an understanding and agreement between them and the said Title Guarantee and Abstract Company that he and said defendants were to acquire and retain said respective interests therein; that immediately on the execution of said pretended deed and the transmission of said several sums by the aforesaid de-

fendant, John F. Hall, and in pursuance of said plan and scheme and intent, said defendant Title Guarantee and Abstract Company made and issued its pretended trust certificates or memoranda as aforesaid to each and every of said defendants for his pretended interest in said property and trust as hereinbefore alleged to have been agreed upon by and between said defendants, including a certificate to said John F. Hall and James T. Hall for a two-twelfths interest thereof, said James T. Hall being a brother of said John F. Hall, and said defendants and each and every of them accepted said certificates so issued to him as evidence of his interest in said trust, and your orator, on information and belief, alleges the fact to be that each of said defendants is now the holder of said certificate so issued to him, and that each of them claims the interest in said property indicated and shown by such certificate held by him; that the defendant John F. Hall, with the knowledge and consent of the aforesaid defendants, who at all times knew the confidential relations existing between the said defendant John F. Hall and the said Dora Herrmann and your orator, and that he was their attorney in fact and legal and confidential adviser, failed and neglected to report to said Dora Herrmann or to your orator that he had sold the said property to said defendants, or that he or his brother, James T. Hall, had reserved and acquired, as aforesaid, an interest in said property, but fraudulently, wickedly, corruptly and

with intent to deceive, cheat and defraud the said Dora Herrmann and your orator, suppressed and concealed said facts and falsely represented that said property was of no greater value than \$4400.00, and that he had sold the same in good faith for that amount to the said Title Guarantee and Abstract Company."

The Complaint further charges (T., p. 15):

"XIa.

"Your orator further represents and alleges that on or about the 22d day of July, 1911, the defendant East Side Land Company, well knowing all the facts hereinbefore in this Bill of Complaint set forth, entered into an agreement with said defendant Title Guarantee and Abstract Company, trustee, of the particular nature of which your orator is not informed, and that in pursuance of said agreement and in compliance with the terms thereof said defendant Title Guarantee and Abstract Company, for itself and as trustee, wrongfully, fraudulently and corruptly, and with intent to cheat, wrong and defraud your orator of said property, attempted to transfer all of said lands hereinbefore described in this Bill of Complaint to said East Side Land Company, excepting such portions as said defendant Title Guarantee and Abstract Company, trustee, had theretofore attempted to convey or contracted to convey to other parties, and thereupon, and

in pursuance of said agreement, made, executed and delivered to said defendant, the East Side Land Company, a pretended deed of conveyance thereof, which deed was so made and executed on the 22d day of July, 1911, as to entitle the same to be recorded in the office of the County Clerk of said County of Coos on the 26th day of July, 1911, in Deed Book 60, page 349, of the Records of Deeds of Coos County, Oregon; that said defendant East Side Land Company accepted said pretended deed at said time and has ever since and now, wrongfully, and in violation, of the rights of your orator to the title and possession of said described property, claimed and still claims the ownership and holds possession thereof; that said defendant East Side Land Company has no right or title in said premises and said deed so made as aforesaid is void and a cloud upon the title of your orator in said premises; that the officers and all of the stockholders of said defendant East Side Land Company were cestui que trustent under and in the pretended trust attempted to be created under and in the pretended deed of conveyance of said property by the defendant John F. Hall, to the defendant Title Guarantee and Abstract Company, trustee, described in paragraph X of this Bill of Complaint, and said conveyance was without consideration to the Title Guarantee and Abstract Company, trustee, or any consideration except certain shares of its capital stock issued and delivered to the aforesaid cestui que trustent."

And the Complaint further charges that (T., p. 16):

“XII.

“Your orator further represents and alleges that all of the defendants, during all of the times mentioned, resided in and now reside in the close vicinity of said described property, and were at all times intimately acquainted with one another, with said defendant John F. Hall, with said land and its value, and well knew that said sum of \$4400.00 was and is a grossly inadequate consideration and price for said land; that said land is located in close proximity to the growing city of Marshfield, Oregon, and abutts on the deep water of the harbor of Coos Bay, and said defendants and each of them well knew that said land was, at the time of said pretended sale reasonably worth the sum of \$150.00 per acre; that when said transfer had been so effected in the manner hereinbefore set forth, and immediately thereafter, the defendant Title Guarantee and Abstract Company, assuming to act as and claiming to be the trustee for the aforesaid defendants, and at the instance and request and by the direction of said defendants, caused a portion of said land to be platted into pretended lots and blocks for townsite purposes, and thereafter sold a large number of lots from the platted portion thereof for a large amount of money, but for what precise amount, and what was paid to and received by said trustee therefor, is unknown to your orator. * * * ”

And in connection with the same charge, the Complaint further alleges (T., p. 23):

“XVII.

“That from and since the said 30th day of August, 1905, the defendant Title Guarantee and Abstract Company has executed and delivered certain deeds, and has thereby pretended to convey and transfer to the defendants, Henry Sengstacken, Andrew Masters, Charles H. Curtis, Z. T. Siglin, Anna Johansen, S. C. Rogers, John Wall, Mary Pennock, Arthur B. Sandohl, W. R. Haines and Louise B. Haines, Harvey Smith, George Clinkinbeard, Anna D. Clinkinbeard, Chapman L. Pennock, Arne P. Husby, A. E. Cavanaugh, M. A. McLaggen and Minnie McLaggen, First Trust and Savings Bank of Coos Bay, a corporation; J. W. Vingard, Mary A. Peterson, Doris L. Sengstacken, Victor Alto, L. Grayce Gould, Cornelius Woodruff, William J. Leaton, John F. Bane, A. W. Neal, A. R. Welch, William Vaughn, William H. Payne, Hilda Fredericksen, Elizabeth Schieffele, Anthony Stambuck, George H. Elliott, Nellie Chandler, T. V. Johnson, Lisa Alto and J. T. Herrett, divers parts and parcels of the land hereinbefore set forth and described (meaning lots in the townsites last above mentioned), and said defendants now wrongfully claim and pretend to be the owners of the same, and have caused pretended deeds to be recorded in the deed records in the office of the County Clerk

of Coos County, Oregon, and claim to be the owners of the same; * * * ”

The Complaint further charges (T., p. 25):

“XVIII.

“That from and since said 30th day of August, 1905, the defendant Title Guarantee and Abstract Company has collected and received, since it has been in possession of said premises, from the rents, timber and profits thereof, divers sums of money, the amount of which your orator has not sufficient information or knowledge to form a belief from which to set forth and allege herein, but which your orator is informed and believes, and therefore alleges the fact to be, aggregates several thousand dollars, and a sum greatly in excess of the pretended purchase price of \$4400.00 aforesaid for which the defendant John F. Hall pretended to sell the said premises to the defendant Titl Guarantee and Abstract Company, trustee, for the defendants hereinbefore set forth; that on the — day of January, 1912, your orator requested and demanded of the defendant Title Guarantee and Abstract Company an accounting of all the rents, issues, timber and profits of said premises received by it since said 30th day of August, 1905; that on said day your orator also applied to said defendant and offered in writing to pay it the sum of \$4400.00 with interest thereon at the rate of six per cent per annum from the 30th day of August, 1905, and requested it to execute and deliver a good and sufficient

deed to said premises to your orator; that the said defendant refused to account to your orator for said rents, timber, issues and profits, to accept said offer and tender of said sum of \$4400.00 and interest aforesaid, and refused to execute and deliver to your orator said deed to said premises."

"XIX.

"That during the month of January, 1912, your orator applied to and demanded of each and every of the defendants that could be located and found by your orator, that they execute and deliver to your orator a deed sufficient in form to release and quitclaim to your orator any and all claims, interest and estate they and each of them set up and claim to be the owners of in and to said premises by virtue of any deed or other instrument derainged from, by, through, or executed to them or either of them under the pretended deed aforesaid from the defendant John F. Hall to the defendant Title Guarantee and Abstract Company, but the said defendants and each of them refused to execute such deeds or any of such deeds and deliver the same to your orator; that your orator was unable to apply and make demand for conveyances of said property as herein alleged on defendants, Arthur B. Sandohl, Anna Johansen, Arne P. Husby, Mary A. Peterson, Doris L. Sengstacken, L. Grayce Gould, Cornelius Woodruff, A. R. Welch and J. T. Herrett, for the reason that your orator, after due diligence and search,

could not find nor locate said above named defendants within the State of Oregon or elsewhere for the purpose of making demand upon them."

And the Complaint prays, in substance, among other things, for cancellation of the deeds in question; that Christian Herrmann be declared to be the owner and entitled to the possession of the land in dispute; that the defendants be required to surrender possession thereof to complainant; that the claims of all the defendants thereto be declared to be wrongful and void; that the defendants John F. Hall, Henry Sengstacken, S. C. Rogers, J. J. Clinkinbeard, D. L. Rood, James T. Hall, William O. Christensen, Z. T. Siglin, Title Guarantee & Abstract Company, a corporation; East Side Land Company, a corporation, and East Marshfield Land Company, a corporation, be required to account to complainant for the rents, issues and profits of said premises, from August 31, 1905; for complainant's costs and disbursements, and for such other relief as the court might deem just and equitable. (T., p. 27-31.)

Thereafter, on June 25, 1912, Hall, Smith, Sengstacken, Siglin, Clinkinbeard, Rogers, Rood, James T. Hall, Christensen, together with their respective wives, and the Title Guarantee & Abstract Company and the East Side Land Company, filed their joint answer herein. (T., p. 49.)

ANSWER.

The Answer denies that Christian Herrmann, at the times mentioned in the Bill of Complaint, was a subject of the Emperor of Germany. (Answer, par. II, T., p. 50.) At the time of his complaint concerning his citizenship. (T., p. 115-116.) And defendants introduced no evidence to the contrary.

The Answer also denies that Mr. Herrmann is the sole heir of his deceased wife, Dora Herrmann. (T., p. 52. Answer, par. VIII.) Counsel for defendants admitted, however, at the trial that Mr. Herrmann was the sole heir of Dora Herrmann and entitled to any and all rights in and to the property in question herein that she would have owned had she been living. (T., p. 126.)

And in defense to the charges of the Complaint hereinbefore set forth, the Answer admits, denies and alleges, as follows (T., p. 53):

“X.

“Answering paragraph ‘IX’ thereof (Brief, page —), defendants deny each and every allegation therein contained.”

“XI.

“Answering paragraph ‘X’ thereof (Brief, p. —), defendants admit that John F. Hall as attorney in fact of said Dora Herrmann and this complainant, did on the 30th day of Aug-

ust, 1905, make, execute and deliver to the defendant Title Guarantee & Abstract Company, trustee, a certain deed of conveyance, a copy of which is attached to the Bill of Complaint herein marked 'Exhibit B' (T., p. 33), and defendants admit that said deed was recorded as alleged by complainant; and said defendants deny each and every other allegation therein contained except as may be hereinafter specifically stated, admitted or qualified."

The Answer continues (T., p. 54):

"XIII.

"Answering paragraph 'XIa' thereof (Brief, p. —), defendants admit that said Title Guarantee & Abstract Company, trustee, made, executed and delivered to defendant East Side Land Company a deed of conveyance on the 22d day of July, 1911, to the lands or portions of lands described in this Bill of Complaint, and that said deed was duly recorded; and said defendants deny each and every other allegation in said paragraph contained."

The Answer further admits and alleges (T., p. 54):

"XIV.

"Answering paragraph 'XII' thereof (Brief, p. —), defendants admit that they during all the times mentioned in said Complaint reside in the vicinity of said described property, and that they were acquainted with each other and

with the defendant John F. Hall and with said land and its value; and defendants admit that said land is located near the city of Marshfield, Oregon, and abuts on one of the inlets of Coos Bay, and that said Title Guarantee & Abstract Company caused a portion of said land to be platted into lots and blocks for townsite purposes, and thereafter sold certain of said lots for sums of money in terms as set forth in the account marked 'Exhibit A' (T., p. 72) attached hereto and made a part hereof; and these defendants deny that said defendant Title Guarantee and Abstract Company, or any other defendants herein, has ever received any further, other or different amount or amounts from the sale or use of said lands or any portion thereof than as shown by said 'Exhibit A'; that said account marked 'Exhibit A' shows the true state of the financial transactions since the date of conveyance of said lands of August 30th, 1905, and said account shows what part of the proceeds and avails from said lands were paid upon the purchase price thereof and what portions were disbursed for other purposes, and defendants deny that the facts with reference to the sale of lots or the disbursements of the proceeds thereof are any different or otherwise than as shown by said 'Exhibit A'; and said defendants do deny each and every other allegation in said paragraph contained."

And in connection with the same matter, the Answer further alleges (T., p. 57):

“XIX.

“Answering paragraph ‘XVII’ thereof (Brief, p. —), defendants do admit that the defendant Title Guarantee & Abstract Company has executed and delivered deeds to premises of said described property to persons named in said paragraph; and defendants deny each and every other allegation in said paragraph contained.”

The Answer further alleges (T., p. 57):

“XX.

“Answering paragraph ‘XVIII’ thereof (Brief, p. —), defendants admit that the defendant Title Guarantee & Abstract Company has collected and received up to the time of conveyance to defendant East Side Land Company from the rents, timber and profits of said described lands such a sum of money as is shown on ‘Exhibit A’ (T., p. 72) to have been received before said date of conveyance and transfer, and defendants deny that the Title Guarantee & Abstract Company or other defendant has received any further or different sums than as in said account set out; and defendants admit that this complainant requested and demanded an accounting of all the rents, issues, timber and profits from said described lands since the 30th day of August, 1905, and defendants allege that this complainant was then and there referred to said accounting, which is a copy of ‘Exhibit A,’ attached to the

Answer to the original Bill of Complaint herein, and which was then and there in this complainant's possession; and defendants admit that this complainant on the — day of January, 1912, tendered the defendant Title Guarantee & Abstract Company the sum of Forty-four Tundred Dollars (\$4400.00), with interest thereon at the rate of six per cent per annum from the 30th day of August, 1905, and then and there requested the execution and delivery of a deed of conveyance to said described lands to this complainant, and that the said defendant Title Guarantee & Abstract Company refused to accept said offer and tender of said sum and refused to execute and deliver to this complainant said deed so requested; and defendants deny each and every other allegation in said paragraph contained."

"XXI.

"Answering paragraph 'XIX' thereof (Brief, p. —), defendants admit each and every allegation therein contained."

And the Answer further admits, denies, alleges, explains and excuses, as follows (T., p. 59):

"XXV.

"And as a first, further and separate answer and defense to the complaint herein, defendants do allege:

“1. That on May 17, 1905, Dora Herrmann and this complainant, her husband, were living in the Empire of Germany; that the said Dora Herrmann then claimed to be the owner of the lands described in the complaint; that the said Dora Herrmann and the complainant, her husband, had theretofore appointed defendant John F. Hall as their attorney in fact under a duly executed power of attorney by virtue of which the said Hall was empowered to sell and convey in their behalf the lands described in the complaint.

“2. That the said Dora Herrmann was a woman with marked business capacity and had shrewdly managed her own business affairs since the death of her husband (Mr. Norman) in 1896; that the said Dora Herrmann, before removing to Germany in 1902, had lived in close proximity to the lands described in the complaint for upwards of twenty-five years and knew all about the location and topography of the lands described, the then value thereof, and the possibilities of enhancement; that after removing to Germany and up to the time of her death on September 18, 1905, the said Dora Herrmann solely managed her affairs in Coos County and kept herself advised by correspondence and subscribed to Marshfield, Oregon, newspapers, of the progress and development of the community; that the said Dora Herrmann was very anxious to dispose of her Coos County property and repeatedly scolded her attorney in

fact because he was not able to make earlier sales, and especially urged her said attorney in fact to sell the lands described in the complaint; that there was no marked change in the local conditions of Marshfield from the time of the removal of said Dora Herrmann to Germany to the time of the conveyance of said property, which would tend to enhance the value of said property.

“3. That said Dora Herrmann being fully advised as to the value of her property, did in April and June, 1905, specifically authorize and direct her said attorney in fact to sell the said described lands for the price of \$4000.00.

“4. That on May 17, 1905, the said defendant John F. Hall, as attorney in fact for said Dora Herrmann and this complainant, did sell said lands to defendants Henry Sengstacken and L. D. Smith for the price of \$4400.00—\$2200.00 cash and \$2200.00 due in one year at 6 per cent interest per annum, secured by purchase price mortgage; that said purchasers then and there paid down to said Hall the sum of \$100.00 in the form of an unconditional promissory note due in ten days, signed by both purchasers; that the balance of said cash, \$2100.00, was agreed to be paid when said Hall should furnish a satisfactory abstract of title; that said Hall then ordered an abstract and the title was accepted by defendants Smith and Sengstacken in the latter part of August, 1905.

“5. That said price of \$4400.00 was the then reasonable market value of said property and was the highest and best price obtainable by said Hall; that said lands were never reasonably worth any greater sum than \$4400.00 at any time during the interval from May 17, 1905, to August 31, 1905.

“6. That in August, 1905, the said Sengstacken and Smith decided to form a syndicate to take over their purchase of said lands; and the said Sengstacken and Smith did interest with them defendants, S. C. Rogers, J. J. Clinkinbeard, D. L. Rood and one Herbert Rogers who is not named as a defendant herein; that the said Sengstacken and Smith agreed with said persons to form a syndicate to take over the purchase of said lands, and each of said persons agreed to pay in on the purchase price in proportion as follows:

“Henry Sengstacken, three-twelfths;

“L. D. Smith, three-twelfths;

“J. J. Clinkinbeard, two-twelfths;

“S. C. Rogers, two-twelfths;

“D. L. Rood, one-twelfth;

“Herbert Rogers, one-twelfth;

and it was agreed and understood that said syndicate should take over the purchase of said lands by Sengstacken and Smith and that each should have an interest in said property ac-

ording to the proportion of his payment as agreed aforesaid; and it was further agreed and understood by the several members of said syndicate that title to said property should be taken in trust for their benefit in the name of the Title Guarantee & Abstract Company, a corporation, trustee.

“7. That upon acceptance of said title by said Sengstacken and Smith in the latter part of August, 1905, it was then and there agreed by and between said Sengstacken and Smith on their own behalf and on behalf of said syndicate, and said John F. Hall, attorney in fact, that said deed should be made and executed ready for delivery on August 30, 1905, and should run to Title Guarantee & Abstract Company, a corporation, trustee, as grantee, and that on said 30th day of August, 1905, the first payment of said purchase price of \$2200.00 should be fully paid by said syndicate and a purchase price mortgage securing the balance of \$2200.00, should also on August 30, 1905, be executed by said grantee and delivered to said attorney in fact.

“8. That in the forenoon of August, 30, 1905, pursuant to said understanding and agreement said S. C. Rogers and J. J. Clinkinbeard went to the office of said Hall and paid to said Hall their proportionate shares of said \$2200.00, and then and there said Hall read to them said deed of said property, which was then

and there by them approved and accepted; that during said day L. D. Smith and D. L. Rood paid in their proportionate shares of said purchase price to defendant Henry Sengstacken; that after said payment into Sengstacken and Hall as aforesaid the said Herbert Rogers refused to make payment of his proportionate interest; that said Sengstacken on the afternoon of said day paid over to said Hall the proportionate interest of himself, Smith and Rood, and then and there, without the knowledge of any other member of said syndicate, stated to said Hall that said Herbert Rogers had refused to take up his one-twelfth interest, and then and there suggested and asked said Hall to take the interest of said Herbert Rogers in lieu of commissions; that said Hall refused to take said interest alone, but agreed with his brother and partner, J. T. Hall, to take said interest in the name of Hall & Hall; that the deed and mortgage were then on the following day acknowledged and delivered and defendant John F. Hall on August 31, 1905, sent a statement of account to said Dora Herrmann, remitting to her the balance of said purchase price in his hands after deducting his agreed commissions and other expenses incidental to her other properties.

“10. That said defendant John F. Hall never had any idea of participating in any manner in said purchase until the said Sengstacken requested him to take the interest of Herbert

Rogers in lieu of commissions as alleged aforesaid; that said defendant John F. Hall sold said land for the best price obtainable and in every way to the advantage of Dora Herrmann and this complainant, and in the selling of said land, in no way acted for himself or in his own interest; that said sale was made and consummated before the said John F. Hall thought of taking, or agreed to take, any interest therein.

“11. That the interest of each and all the members of said purchasing syndicate has passed by assignment and conveyance to defendant East Side Land Company, a corporation, subject to certain lot sales alleged in the Bill of Complaint; and the said East Side Land Company is now the owner of the lands described in the complaint, free from any and all equities of this complainant.

The Answer further alleges (T., p. 64):

“XXVI.

“And as a second, further and separate defense to said complaint, defendants do allege:

“1. That said Dora Herrmann or this complainant on May 17, 1905, or at any time subsequent thereto, never owned the lands described in the complaint or any part thereof and had no right to make a sale or conveyance thereof; but that said title was then in other persons and the same has since been acquired by mesne

conveyance by defendant East Side Land Company, a corporation.”

At the time of trial in the court below, however, counsel for defendants expressly repudiated and abandoned this defense. (T., p. 88.)

The Answer further confesses and excuses as follows (T., p. 65):

“XXVII.

“And as a third, further and separate defense to said complaint, defendants do allege:

“1. That said defendants, Henry Sengstacken and L. D. Smith, on May 17, 1905, purchased said described lands from Dora Herrmann and this complainant by and through their said attorney in fact, John F. Hall; that in such purchase and sale there was no collusion, confederation or conspiracy whatsoever between said purchasers and said Hall in fraud of the rights of said Dora Herrmann or this complainant or otherwise; that said purchase was made by said Sengstacken and Smith without any expectation on their part that said Hall was thereafter to acquire any interest in said property; that said sale and purchase was in no way tainted with fraud, and the said Dora Herrmann received the reasonable market value of said property; that thereafter in taking over the title to said property, through no collusion, confederation or conspiracy of said Seng-

stacken, Smith and Hall, the said Hall acquired a one twenty-fourth interest therein, and in the acquisition of said interest the said Hall acted in good faith, believing that he was lawfully entitled to take said interest; that thereafter neither these defendants, Sengstacken and Smith, nor said Hall, ever intentionally concealed from the said Dora Herrmann or this complainant any of the facts in connection with said sale and passing of title, but said defendants, Sengstacken and Smith, believed and presumed that the said Dora Herrmann and this complainant knew all the facts in connection with said sale at the time thereof or immediately thereafter, and that the said sale and transfer was then and there ratified by said Dora Herrmann and this complainant.

“2. And likewise, when said syndicate was formed by defendants, Sengstacken, Smith, Rogers, Clinkinbeard, Rood and Herbert Rogers to take over the purchase of said Sengstacken and Smith, there was no collusion, confederacy or conspiracy between them and the said John F. Hall in fraud of the rights or interests of said Dora Herrmann or this complainant, or otherwise; nor did said members of said syndicate nor said Hall expect, believe or suspect that said Hall was thereafter to acquire any interest whatsoever in said property; that the agreement of said syndicate with said Hall to take over the said purchase of Smith and Sengstacken was in no way tainted with

fraud, and the said Dora Herrmann received the reasonable market value of said property; that thereafter, in taking over the title of said property, the said Herbert Rogers refused to contribute his proportion of the purchase price as he had theretofore agreed, and the said John F. Hall agreed with his brother to take the interest of said Herbert Rogers in lieu of their commissions; that thereby, after all the other members of said syndicate had paid in their proportionate shares, the said John F. Hall acquired a one twenty-fourth interest in said property; that the said interest was acquired by said John F. Hall honestly and in good faith, he believing at that time that he had a right to acquire said interest; that said interest was taken by said John F. Hall without any knowledge thereof on the part of any of the members of said syndicate except said Henry Sengstacken and James T. Hall; that thereafter none of the members of said syndicate, nor said Hall, ever intentionally concealed from the said Dora Herrmann or this complainant any of the facts in connection with the said sale or passing of title, but the members of said syndicate have each believed and presumed that the said Dora Herrmann and this complainant knew all of the facts in connection with said sale at the time thereof or immediately thereafter, and that the said sale and transfer was then ratified by said Dora Herrmann and this complainant.

“3. That the said interests of said Hall & Hall, and S. C. Rogers, for value received, were thereafter acquired by said Sengstacken.

“4. That the said interest of said J. J. Clinkinbeard, for value received, was thereafter acquired by said Smith.

“5. That the said interest of D. L. Rood was thereafter, for a valuable consideration, acquired by defendant Z. T. Siglin without any knowledge whatever of any of the facts or circumstances in the matter of the acquisition of the Hall & Hall interest as heretofore alleged.

“6. That said Sengstacken, Smith and Siglin, being the owners of all of the equitable interests in said property, organized the East Side Land Company as a holding corporation and caused the legal and equitable title in said property to be conveyed to said East Side Land Company; and in consideration of such conveyance, each received an amount of the capital stock of said East Side Land Company in proportion to their respective interests.

“7. That the said East Side Land Company is now the owner of said lands described in the complaint herein, except for the sale of a few lots to individual purchasers, and this complainant is neither at law or in equity entitled to any interest therein, and has no just claim to any part thereof.”

Thereafter, on the 2d of July, 1912, Christian Herrmann filed his Reply to the Answer. (T., p. 75.)

REPLY.

The Reply denies generally each and every allegation contained in the Answer, save and except only such as admit the allegations of the Bill of Complaint.

After the time he filed his Bill of Complaint, Mr. Herrmann satisfied himself that the various persons to whom the Title Guarantee & Abstract Company, trustee, and the East Side Land Company had sold lots in the townsites of East Side and Home Addition to East Side, who were made defendants in the complaint, were innocent of any knowledge of the way in which their grantors had obtained title thereto. And complainant, therefore, asked for no relief against such defendants.

Complainant also adjusted his differences with the defendant, East Marshfield Land Company, before the date of trial, and, therefore, asked for no relief against it.

Thereafter, on the 3d of February, 1913, the Honorable District Court, having heard the evidence, etc., rendered the following Opinion (T., p. 80):

OPINION.

The court, after deciding that "there is nothing in the record to support the charge of actual fraud made in the bill" (T., p. 80), held as follows (T., p. 82):

" * * * Hall was and had been, for several years prior to the sale, the agent and attorney in fact of Mrs. Herrmann, who formerly resided on Coos Bay, but emigrated to Germany in 1900 or 1901, where she continued to reside up to the time of her death, September 18, 1905.

"Mrs. Herrmann, as evidenced from her correspondence, was a woman of more than ordinary business capacity, thoroughly familiar with her property, and Hall, in transacting business for her and especially in the sale of her property, followed her instructions rather than his own initiative. For some time prior to May, 1905, she had repeatedly written him, urging and authorizing him to sell the property in controversy for four thousand dollars. Hall made repeated and diligent efforts to do so but was unable to effect a sale until May 17, 1905, when he contracted to sell the same to defendants, Sengstacken and Smith, for \$4400.00, half in cash and the balance on time, secured by mortgage. Sengstacken and Smith gave him at the time their joint note for one hundred dollars as part payment on the purchase price, for which he gave them a receipt specifying that

it was to apply on the purchase price of the property now in controversy. The transaction was to be completed and the title papers passed when the abstract could be prepared and the title approved.

“At the instance of Sengstacken and Smith, S. C. Rogers and J. J. Clinkinbeard agreed to each take a two-twelfths interest in the property, and D. L. Rood and Herbert Rogers each a one-twelfth interest, leaving six-twelfths to be divided equally between Sengstacken and Smith, it being agreed between the intending purchasers that, as a matter of convenience the land should be deeded to the Title Guarantee & Abstract Company in trust for the owners.

“On August 30, 1905, the day the sale was to have been consummated and the papers exchanged, Clinkinbeard and S. C. Rogers paid to Hall direct their two-twelfths each of the first payment; Rood and Smith paid their one-twelfth and three-twelfths respectively to Sengstacken to be paid to Hall. Herbert Rogers, however, declined to proceed with the purchase and take a one-twelfth interest in the property, for the reason that he did not deem it a good investment. After Clinkinbeard and S. C. Rogers had paid their proportion to Hall and when Sengstacken went to Hall's office to pay the balance of the first payment, he informed Hall of Herbert Roger's refusal to take one-twelfth of the property and suggested to Hall that he take such interest as a part of his commission

for making the sale. Hall declined to do so without first consulting his partner who had an interest in the commission, whereupon Sengstacken paid Hall the balance due, except for the one-twelfth interest, and Hall credited Mrs. Herrmann with the entire amount due, agreeing to look to Sengstacken personally for the deficit, in case he and his partner should conclude not to take the interest offered. At that time the deed had been prepared and signed but not acknowledged. After consulting with his partner and on the following day, Hall informed Sengstacken that they would take the Herbert Roger's one-twelfth interest, and the deed was thereupon acknowledged and delivered. None of the purchasers except Sengstacken had any knowledge of this transaction with Hall until some time after the matter had been completed and deed to the abstract company delivered.

“That Hall acted in the utmost good faith and with no intention of injuring or cheating his principal is manifest from the testimony. He had been repeatedly implored by her to make the sale, as she represented she was badly in need of money, and he was consequently anxious that it should not fall through. He was in no way interested with Sengstacken and Smith in the original contract for the purchase, and had no idea or thought of taking a part of the property until it was suggested to him by Sengstacken on the day the matter was consum-

mated and after S. C. Rogers and Clinkinbeard had made their payments and the deed of conveyance had been prepared and signed.

“Under these circumstances it is clear to my mind that Hall’s purchase could not in any way affect the title of the other parties. All of them except Sengstacken were ignorant of the matter until some days after the same had been consummated. They were in no way responsible for nor parties to Hall’s purchase, and could not be affected thereby.

“Nor do I think the purchase by Hall is constructively fraudulent or voidable as to him. It is, of course, settled law that an agent authorized to sell property cannot himself become the purchaser without the consent of his principal, and if he does so the transaction is void as it respects the principal unless ratified by him with full knowledge of all the circumstances. The reason of this rule is that the law will not permit an agent to place himself in a situation in which there is a conflict between duty to his principal and his own personal interest, and therefore the fact that in a given case the agent’s motives were honorable, and that the result was beneficial to the principal will make no difference if the latter chooses to repudiate the transaction. (Mechem on Agency, Sec. 445-461; Robertson vs. Chapman, 152 U. S. 673.) But the reason of the rule does not apply in this case. Here the sale was virtually made by Hall to Sengstacken in May, 1905. At that time it is

admitted he had no interest either immediate or prospective in the property and no idea that he would ever acquire one. His duty to his principal ceased at the time his contract with Sengstacken and Smith, as far as the fact of the sale was concerned. Thereafter there was no conflict between his duty to his principal and self interest in that regard. His subsequent taking title to an undivided one twenty-fourth was, to all intents and purposes, a purchase from Sengstacken and Smith or Herbert Rogers, and not from himself as agent of Mrs. Herrmann. The fact that the deed had not been formally acknowledged and delivered at the time cannot change the effect of the transaction, or, in my judgment, bring it within the rule prohibiting an agent from buying from himself, nor the evil to be prevented thereby.

“It follows that the bill should be dismissed and it is so ordered.”

SPECIFICATION OF ERRORS.

I.

The court erred in refusing to grant complainant's prayer for the recovery of the land in controversy.

II.

The court erred in holding that Hall contracted to sell the land to Sengstacken and Smith, on May

17, 1905; that Hall's duty to his principals thereupon ceased, and that he was at liberty thereafter, and before the deed conveying the property to the Title Guarantee & Abstract Company, trustee, was executed and delivered, to speculate with the subject matter of his agency.

III.

The court erred in holding that none of the other members of the purchasing syndicate, except Sengstacken, knew of the understanding between Sengstacken and Hall, whereby it was agreed that Hall should have a share in the syndicate and a joint undivided interest in the land, until after the time of the execution and delivery of the deed to the Title Guarantee & Abstract Company, trustee for said syndicate, on August 31, 1905, and that, therefore, "they should not be affected thereby."

POINTS AND AUTHORITIES.

I.

1. If an agent for the purpose of selling property of his principal purchases it himself, either directly or through the instrumentality of a third person, without the knowledge and consent of the principal, the sale is voidable; it will always be set aside at the option of the principal; and the amount of consideration, the absence of undue advantage, and other similar features, are wholly immaterial. Noth-

ing will defeat the principal's right of remedy, except his own confirmation after full knowledge of all the facts.

- Mechem on Agency, Sec. 454, 455, 461.
- Michoud vs. Girod, 4 How. (U. S.) 503.
- Gardner vs. Ogden, 22 N. Y. 327.
- Wormley vs. Webb, 44 Mo. 444, 450.
- Mills vs. Goodsell, 5 Conn. 475.
- Bain vs. Brown, 56 N. Y. 288.

The fact that the agent purchased at the price he was authorized to sell will not make the transaction valid.

- Tillney vs. Wolverton, 46 Minn. 256.
- Porter vs. Woodruff, 36 N. J. Eq. 174.

And where the agent purchases his principal's property jointly with another, the transaction is likewise invalid, both as to the agent and his co-purchaser. Equity will not permit another to profit through the violation of a fiduciary relation any more than it will permit the agent himself to do so.

- Reeves vs. Calloway, et al., 78 S. E. (Ga.) 717.
- Smith vs. Seattle, etc., R. R. Co., 72 Hun. (N. Y.) 202; 25 N. Y. Supp. 368.
- O'Meara vs. Lawrence, 141 N. W. (Ia.) 312.
- Hoffman Coal Co. vs. Cumberland Coal Co., 16 Md. 456.
- O'Dell vs. Rogers, et al., 44 Wis. 136.
- Mitchem vs. Mitchem, 3 Dana (Ky.) 266.

Finch vs. Conarde's Exr., 154 Pa. St. 326.

Miller vs. Ry Co., 83 Ala. 274; 3 Am. St. Rep. 722.

Norris vs. Tayloe, 49 Ill. 18.

And where the agent sells his principals property to an association or partnership, of which he is a member, the sale is likewise invalid, not only as to the agent himself, but as to all his associates as well.

Robbins vs. Butler, 24 Ill. 387, 432.

Bedford Coal Co. vs. Parke Co. Coal Co., 89 N. E. 412.

Curry vs. King, 92 Pac. (Cal.) 662.

Frye vs. Platt, 32 Kan. 62.

People vs. Township, 11 Mich. 222, 228.

2. And a subsequent purchaser from the agent or his co-purchasers, with notice of their unlawful transaction, stands in no better position than they occupied, and holds as trustee for the principal.

Hoffman Coal Co. vs. Cumberland Coal Co., 16 Md. 456.

Cumberland Coal Co. vs. Sherman, et al., 30 Barb. (N. Y.) 553.

Bank vs. Gray, 84 Ky. 565.

II.

1. Any agreement for the sale of real property, or any interest therein, is void, unless the same or some note or memorandum thereof, expressing the consideration, be in writing and subscribed by the

party to be charged or by his lawfully authorized agent. No evidence of such agreement is admissible other than the writing, or secondary evidence of its contents.

Lord's Oregon Laws, Secs. 804, 808.

Lord's Oregon Laws, Sec. 804, provides that:

"No estate or interest in real property, other than a lease for a term not exceeding one year, nor any trust or power concerning such property, can be created, transferred, or declared otherwise than by operation of law, or by a conveyance or other instrument in writing, subscribed by the party creating, transferring, or declaring the same, or by his lawful agent, under written authority, and executed with such formalities as are required by law."

Lord's Oregon Laws, Sec. 808, provides that:

"In the following cases the agreement is void unless the same or some note or memorandum thereof, expressing the consideration, be in writing and subscribed by the party to be charged, or by his lawfully authorized agent; evidence, therefore, of the agreement shall not be received other than the writing, or secondary evidence of its contents, in the cases prescribed by law:

* * *

"6. Any agreement for the leasing, for a longer period than one year, or for the sale of

real property, or any interest therein."

* * *

The note or memorandum "must show who are the contracting parties, intelligently identify the subject matter involved, express the consideration, be signed by the party to be charged, and disclose the terms and conditions of the agreement."

Catterlin vs. Bush, 39 Or. 496.

Frye vs. Platt, 32 Kan. 62; 3 Pac. 781.

Williams vs. Morris, 95 U. S. 444, 456.

Ross vs. Allen, 45 Kan. 231; 25 Pac. 570.

Sheid vs. Stamps, 34 Tenn. 172.

Lippincott vs. Bridgewater, 55 N. J. Eq. 208.

And "no less evidence of the contents of such written instrument, when the original is lost, will satisfy the demands of the law. The terms of the contract cannot be inferred, they must be affirmatively proven." The contract "must be proven specifically, and not in general terms."

McCarthy vs. Kyle, 4 Coldwell's Rep. (Tenn.) 348.

Tayloe vs. Riggs, 1 Pet. (U. S.) 591.

Edwards vs. Noyes, 65 N. Y. 125.

Nicholson vs. Tarpey, 89 Cal. 617.

Rankin vs. Crow, 19 Ill. 626.

Hooper vs. Chism, 13 Ark. 496.

The parol evidence, to be admissible, should purport to give the "language" of the alleged lost instrument, and "testimony as to the propositions

made and accepted therein, as construed by the witness," is incompetent.

Elwell vs. Walker, 52 Iowa 256, 262-263.

Scurry vs. City of Seattle, 56 Wash. 1.

Carpell vs. Fagan, 30 Mont. 507; 77 Pac. 55.

Before secondary evidence is admissible to show the contents of a lost paper, however, it must appear, first, that the writing is lost and cannot be found by diligent search; and, second, it must be proved that the instrument was executed or subscribed with all the formalities required by law.

Shrowders vs. Harper, 1 Har. (Del.) 444.

As to loss:

Blondeau vs. Sheridan, 81 Mo. 545, 556.

Folsom's Exr. vs. Scott, et al., 6 Cal. 460.

Bascom vs. Turner, 5 Ind. App. 229, 236.

Holbrook vs. School Dist., 28 Ill. 187.

As to execution:

Holman vs. Borchers, 24 Mo. App. 629, 636.

Edwards vs. Noyes, 65 N. Y. 125.

Helton vs. Asher, 103 Ky. 730, 733-734.

Moor vs. Cary, 42 Me. 29.

Porter vs. Wilson, 13 Pa. St. 641, 645.

Smith vs. Smith, 106 Ga. 303, 306-307.

2. Where an agent has been employed to sell and convey property, his duty to his principal does not terminate when he has entered into a mere contract to sell. The agent's duty does not cease until

the contract has been executed and title to the property passed.

Wing & Evans vs. Hartupee, 122 Fed. 897.

Cook vs. Berlin Woolen Mills, 43 Wis. 433.

Parker vs. McKenna, L. R. 10 Ch. App. 96.

III.

1. Notice of any fact affecting a transaction to one of two purchasers, who acts for his associate as well as for himself in negotiating or consummating a purchase, is notice to the associate.

McLean vs. Clark, et al., 47 Ga. 24, 69.

Smith vs. Adams, 4 Tex. Civ. App. 5.

Atterbury vs. Hopkins, 122 Mo. App. 172.

Richards, et al. vs. Sutter, 125 S. W. (Ark.) 1018.

Stanley vs. Green, 12 Cal. 149.

“The doctrine is well established and rests upon sound principles of law that a person who seeks to avail himself of a contract made by another for him, whether by appointment or by a self constituted agent, is bound by the representations made and the methods employed by the agent to effect the contract.”

Wilson vs. McCarthy, 134 Pac. (Or.) 1189.

Presby. vs. Parker, 56 N. H. 409.

Darner vs. Brown, 137 N. W. 461.

Harrell vs. Brooks, 113 S. W. 961.

Krum vs. Bench, 96 N. Y. 398.

Morse vs. Ryan, 26 Wis. 356.

2. Notice of any fact affecting title of property to a trustee thereof is notice to the cestui que trust.

Meyers vs. Ross, 40 Tenn. 59.

Pope vs. Pope, 40 Miss. 516.

Houston Oil Co. vs. Hayden, 135 S. W. (Tex.) 1149.

Schofield vs. Cogdell, 113 S. W. (Tenn.) 375.

3. Where the owner is illegally deprived of his property, he is at liberty to follow it into the hands of any subsequent grantee, until it reaches the hands of a bona fide purchaser for a valuable consideration, without notice of his rights.

Oliver vs. Piatt, 3 How. (U. S.) 401.

And where the title, after a transfer even to an innocent purchaser reverts in the original fraudulent grantee, the equitable rights of the original owner re-attach to it in his hands.

O'Dell vs. Rogers, 44 Wis. 136, 180.

Bourquin vs. Bourquin, 120 Ga. 115, 117-119.

Trentman vs. Eldridge, 98 Ind. 525.

Johnson vs. Gibson, 116 Ill. 294.

Talbert vs. Singleton, 42 Cal. 390.

Church vs. Church, 25 Pa. St. 278.

Bank vs. Wilcox, 24 Wis. 671.

II Pomeroy's Eq. Jur., Sec. 754.

I Story's Eq. Jur. (13 Ed.), Sec. 410.

BRIEF OF ARGUMENT.

The right of the complainant to the relief prayed for in this suit is based upon the fact that Hall, while acting as agent for complainant and his wife for the sale and conveyance of the land in question, under a general power of attorney, sold and transferred it to the Title Guarantee & Abstract Company, trustee, under an express understanding and agreement that said company was to receive and hold the legal title of said property in trust for the joint benefit of Hall himself and his associates in the deal, Sengstacken, Smith, Rogers, Rood and Clinkinbeard, without the knowledge or consent of his principals.

Hall's interest in the transaction is not denied. In fact, defendants themselves expressly admit that he and Sengstacken, who was acting on behalf of the purchasing syndicate, entered into an understanding whereby it was agreed that he was to have a joint, undivided interest in the land with the other members of the syndicate, before he executed and delivered the deed thereof to the Title Guarantee & Abstract Company, trustee.

Notwithstanding these facts, however, defendants contended, and the trial court held, that complainant was not entitled to the relief prayed for, because Hall had agreed to sell the land to Sengstacken and Smith, on May 17, 1905, before he had the understanding with Sengstacken whereby he

was to share in the purchase; that Hall's duty to his principals ceased when he entered into the agreement to sell the land to Sengstacken and Smith, on May 17, and that he was at liberty thereafter to speculate with the subject matter of his agency.

And the defendants further contended, and the court held, that all the other members of the purchasing syndicate, except Sengstacken, were ignorant of the understanding entered into by and between Hall and Sengstacken, whereby Hall was to have an interest in the land which he was conveying, until after the deed thereof to the Title Guarantee & Abstract Company, trustee, had been executed and delivered, and that, therefore, they "should not be affected thereby."

We respectfully urge that the trial court erred in refusing to grant the relief prayed for by the complainant, and in sustaining defendants' contentions, for the following reasons:

I.

The Court Erred in Refusing to Grant Complainant's Prayer for the Recovery of the Land in Controversy.

1. *Hall sold the land to a syndicate of which he himself was a member.*

The facts upon which complainant founds his right of recovery in this suit are expressly admitted by defendants. It is admitted that Hall was

agent for Mr. and Mrs. Herrmann. (Answer, T., p. 59.) It is admitted that Hall was a member of the syndicate to which he sold and conveyed his principals' property at the time he executed and delivered the deed thereof to the Title Guarantee and Abstract Company, trustee for said syndicate, on August 31, 1905. (Answer, T., p. 61-64. Sengstacken's testimony, T., p. 331-332.) And the evidence shows, and it is admitted, that Mr. and Mrs. Hermann were never informed as to whom Hall had sold and conveyed their property. (Hermann's testimony, T., p. 142-144. Hall's testimony, T., p. 249-255.)

Under these circumstances, it was not necessary for complainant to show that Hall and his co-purchasers committed *actual* fraud in acquiring the land in order to set the transaction aside. The law is well settled that an agent cannot purchase his principal's property, without the latter's knowledge and consent. And it is not necessary, in order for the principal to set such a transaction aside, to show that *actual* fraud has been perpetrated in the consummation of the sale, or that he has been damaged in any way, or that the price paid was inadequate, or that the transaction was unfair in any particular. The law gives the principal the absolute right to repudiate such a transaction at his mere option.

The court states the rule and its reasons very clearly in *Porter vs. Woodruff*, 36 N. J. Eq. 174, in the following language:

“ * * * The general interests of justice and the safety of those who are compelled to repose confidence in others alike demands that the courts shall always inflexibly maintain that great and salutary rule which declares that an agent employed to sell cannot make himself the purchaser, nor, if employed to purchase can he himself be the seller. The moment he ceases to be the representative of his employer and places himself in a position toward his principal where his interests may come in conflict with those of his principal, no matter how fair his conduct may be in the particular transaction, that moment he ceases to be that which his services requires and his duty to his principal demands. He is no longer an agent but an umpire; he ceases to be the champion of one of the contestants in the game of bargain, and sets himself up as a judge to decide, between his principal and himself, what is just and fair. The reason of the rule is apparent; owing to the selfishness and greed of our nature, there must, in the great mass of transactions of mankind, be a strong and almost ineradicable antagonism between the interests of the seller and the buyer, and universal experience has shown that the average man will not, where his interests are brought in conflict with those of his employer, look upon his employer's interests as

more important and entitled to more protection than his own.

“In such cases the courts do not stop to enquire whether an agent has obtained an advantage or not, or whether his conduct has been fraudulent or not, when the fact is established that he has attempted to assume two distinct and opposite characters in the same transaction, in one of which he acted for himself and in the other pretended to act for another person, and to have secured for each the same measure of advantage that would have been obtained if each had been represented by a disinterested and loyal representative, they do not pause to speculate concerning the merits of the transaction, whether the agent has been able so far to curb his natural greed as to take no advantage, but they at once pronounce the transaction void because it is against public policy. The salutary object of the principle is not to compel restitution in case fraud has been committed or an unjust advantage has been gained, but to elevate the agent to a position where he cannot be tempted to betray his principal. Under a less stringent rule, fraud might be committed or unfair advantage taken, and yet, owing to the imperfections of the best of human institutions, the injured party be unable either to discover it or prove it in such manner as to entitle him to redress. To guard against this uncertainty, all possible temptation is removed, and the prohibition against an agent acting in a

dual character is made broad enough to cover all transactions. * * *

In *Michoud vs. Girod*, 4 How. (U. S.) 555, the court said:

“ * * * The inquiry, in such a case, is not whether there was or was not *fraud in fact*. The purchase is void, and will be set aside at the instance of the cestui que trust, and a re-sale ordered, on the ground of the temptation to abuse, and of the danger of imposition inaccessible to the eye of the court. * * * *Is it not better that the cause of the evil shall be prohibited, than that courts of equity shall be relied upon to apply the remedy in particular cases, by inquiring into all the circumstances of a case, whether there has or has not been fraud in fact?*”

In *Wormley vs. Webb*, 44 Mo. 444, the court said:

“ * * * Nothing is better settled than that an agent or trustee, or person acting in a fiduciary capacity, cannot speculate for his private gain with the subject matter committed to his care, to the prejudice of his principal. He cannot be allowed to purchase an interest in property where he has a duty to perform which is inconsistent with the character of purchaser. The law does not presume that such a transaction will always be impressed with fraud, but it furnishes an inducement to fraud,

*and affords opportunities to persons, who should always act with the utmost conscientious and scrupulous good faith, to abuse their trust; and therefore a total disability is enjoined, to take away all temptation. * * **

In *Mills vs. Goodsell*, 5 Conn. 475, the court said:

*“ * * * It is idle to inquire into the fairness or unfairness of transactions of this character; whether the sale, under all circumstances, was or was not the best that could have been made. * * * It is in vain to urge that he gave more than any one else would. * * * The law cuts up, root and branch, the power to purchase, and the temptation to defraud. It will not permit an inquiry into the fairness or unfairness of the transaction.”*

In *People vs. Overijssel*, 11 Mich. 228, Judge Manning said:

*“ * * * If such contracts were to be held valid until shown to be fraudulent or corrupt, the result, as a general rule, would be that they must be enforced in spite of fraud or corruption. Hence the only safe rule in such cases is to treat the contract as void, without reference to the question of fraud in fact, unless affirmed by the opposite party.”*

Mr. Mechem states the rule in the following language:

“ * * * The agent will not be permitted to serve two masters, without the intelligent consent of both. As is said by a learned judge: ‘So careful is the law in guarding against the abuse of fiduciary relations, that it will not permit an agent to act for himself and his principal in the same transaction, so as to buy of himself, as agent, the property of his principal, unless ratified by him with full knowledge of all the circumstances. *To repudiate them he need not show himself damnified. Whether he has been or not is immaterial. Actual injury is not the principle the law proceeds on in holding such transactions void. Fidelity in the agent is what is aimed at, and as a means of securing it, the law will not permit the agent to place himself in a situation in which he may be tempted by his own private interests to disregard that of his principal.*’ ‘This doctrine,’ to speak again in the beautiful language of another, ‘has its foundation, not so much in the commission of actual fraud, as in that profound knowledge of the human heart which dictated that hallowed petition (‘Lead us not into temptation but deliver us from evil’), and that caused the announcement of the infallible truth that ‘a man cannot serve two masters.’ ”

Mechem on Agency, Sec. 455.

“ * * * The law looks at the natural and legitimate tendencies of such transactions, and not at the motive of the agent in a given case. This tendency is *demoralizing*, and the fact

that in a certain case the agent's motive was honorable, or that the result is more beneficial to the principal, will make no difference if the latter chooses to repudiate it. Said a learned judge: 'If such contracts were to be held valid, until shown to be fraudulent or corrupt, the result, as a general rule, would be that they must be enforced in spite of fraud or corruption. Hence the only safe rule in such cases is to treat the contract as void, without reference to the question of fraud in fact, unless affirmed by the opposite party. This rule appears to me so manifestly in accordance with sound public policy as to require no authority for its support.' "

Mechem on Agency, Sec. 461.

In *Bain vs. Brown*, 56 N. Y. 288, the court said:

" * * * *When agents, and others acting in a fiduciary capacity, understand that these rules will be rigidly enforced, even without proof of actual fraud, the honest will keep clear of dealings falling within their prohibition, and those dishonestly inclined will conclude that it is useless to exercise their wits in contrivances to evade it.* * * * "

And the rule is the same where the agent purchases his principal's property jointly with another—the rule affects both the agent and his co-purchaser alike.

Thus, in *Reeves vs. Calloway*, 78 S. E. (Ga.) 717, the plaintiff had employed defendant, Etheridge, an attorney, to advise and represent him in the sale of his land. A sale was made to defendant, Calloway. Afterwards, it developed that Etheridge was interested with Calloway in the purchase. The court said:

“The Code declares that, without the express consent of the principal, after a full knowledge of all the facts, an agent employed to sell cannot be himself the purchaser. * * * *This principle applies as well to a case where the agent joins with a stranger, who has knowledge of the agency, in making the purchase as where the agent is sole purchaser.* In such case the proportion of the purchase money paid by the purchasers is an irrelevant fact. It is immaterial whether the agent’s partner in the transaction furnished all or a part of the money, if he knows of the agency and joins with the agent in the purchase of the property on joint account, or for their mutual benefit. The policy of the law forbids an agent employed to sell to place himself in an attitude of antagonism to the interest of his principal by associating himself with another in the purchase of land, and a sale by an agent without the express consent of his principal to himself in association with another, with knowledge of his agency, will be set aside at the instance of the principal. The law does not inquire in such a case whether there was any fraud, but gives

the principal the absolute right to repudiate the transaction, because it will not allow an agent to take a position which is inconsistent with his duty to his principal."

The same rule is stated in *Smith, et al. vs. Seattle, etc., R. R. Co.*, 72 Hun. (N. Y.) 202; 25 N. Y. Supp. 368, in the following language:

"When an agent is employed to sell, he cannot lawfully become the purchaser. * * * *When he violates these rules he commits a fraud on his principal, and whoever gives an agent an interest in a contract which he is authorized to make, becomes guilty of participating in the fraud of the agent, and a contract so entered into is voidable at the election of the principal.* * * * "

See also:

Hoffman Coal Co. vs. Cumberland Coal Co.,
16 Md. 456.

O'Dell vs. Rogers, 44 Wis. 136.

O'Meara vs. Lawrence, 141 N. W. (Ia.) 312.

Mitchem vs. Mitchem, 4 Dana (Ky.) 266.

Miller vs. R. R. Co., 83 Ala. 274.

Norris vs. Tayloe, 49 Ill. 18.

And where the agent sells his principal's property to an association or partnership, of which the agent is a member, the transaction is likewise void at the principal's option.

The case of *Robbins vs. Butler*, 24 Ill. 387, presents a set of facts somewhat similar to the facts in the case at bar. In that case, William B. Ogden, agent for Allen Robbins, contracted with John Bradley and A. Hyatt Smith to sell his principal's land to the Chicago Land Company, an association, of which said agent was himself a member. The court said (p. 427) :

“Is the contract, made with Bradley and Smith, date 10th of November, 1852, binding on appellant?

* * *

“The parties to the agreement to sell are William B. Ogden (agent) of the first part, and John Bradley and A. Hyatt Smith of the second part, but who are really contracting for the Chicago Land Company, of which W. B. Ogden was a member. The contract recites the agreement of May 31, 18—, under which Ogden's claim to act for Robbins arises.

* * *

“From the fact that W. B. Ogden was a member of the Chicago Land Company, in its inception under another name, as early as May, 1852; that about the time the associates forming this company commenced the purchase of lands with a view of their rise in value; that Bradley and Smith were members of this company, and so known to their associate, Ogden; that he in selling to them was, really, selling to

himself, or to an association of which he was a member; the sale was void, on the well known principle that a trustee cannot be purchaser, directly or indirectly, of the property or estate entrusted to him to sell. * * * Ogden himself was a purchaser as well as vendor. He was a member of the land company to whom he sold the land. *And all his associates are chargeable with the same considerations that would bear upon him were he solely interested as purchaser.* * * * ”

See also:

Bedford Coal Co. vs. Parke Co. Coal Co., 89 N. E. (Ind.) 412.

Frye vs. Platt, 32 Kan. 62.

Curry vs. King, 92 Pac. (Cal.) 662.

Applying these rules to the admitted facts in the case at bar, there can be but one conclusion. The conveyance by Hall to the Title Guarantee & Abstract Company, in trust for the benefit of himself and his associates, should be set aside.

2. *The East Side Land Company is not an innocent purchaser.*

The fact that the Title Guarantee & Abstract Company, trustee, and the members of the syndicate, assigned and transferred the land to the East Side Land Company, which company now claims to own it, does not preclude complainant from his right of relief. It was not claimed by defendants that the

East Side Land Company was an innocent purchaser. And the evidence shows that it was not. Sengstacken, Smith and Siglin organized the East Side Land Company for the sole purpose of receiving and holding the legal title of the land for themselves. (T., p. 312.) It appears that after Sengstacken, Smith and Siglin acquired the equitable interests of all the other members of the purchasing syndicate, they caused the Title Guarantee & Abstract Company, trustee, to convey the legal title of the land to the East Side Land Company. (Answer, T., p. 68.) Sengstacken, Smith and Siglin organized and incorporated the latter company; all the stock thereof was issued to them, and is now owned by them, in the following proportions, to-wit: Sengstacken, six-twelfths thereof; Smith, five-twelfths thereof, and Siglin, one-twelfth thereof. (T., p. 312.) And Sengstacken was made president, and the other offices were filled by the other two members. In the language of the court, in *Cumberland Coal Co. vs. Sherman, et al.*, 30 Barb. (N. Y.) 553:

“ * * * They were its creators; they breathed into it life, and gave it all it had, and owned the whole of it at its creation, * * * and, therefore, what they knew, their creature knew.”

The East Side Land Company, therefore, was impressed with notice of the facts concerning the sale to its grantors, and holds as trustee for the benefit of Mr. Herrmann.

Hoffman Coal Co. vs. Cumberland Coal Co.,
16 Md. 456.

Bank vs. Gray, 84 Ky. 565.

II.

The Court Erred in Holding That Hall Contracted to Sell the Land to Sengstacken and Smith, on May 17, 1905; That Hall's Duty to His Principals Thereupon Ceased, and That He Was at Liberty Thereafter, and Before the Deed Conveying the Property to the Title Guarantee & Abstract Company, Trustee, Was Delivered, to Speculate With the Subject Matter of His Agency.

1. *In the first place, there is no evidence herein showing that Hall contracted to sell the land to Sengstacken and Smith, on May 17, 1905, as claimed by defendants.*

The only witnesses who testified concerning the alleged transaction were Sengstacken, Smith and Hall. In substance, their testimony is to the effect that Hall agreed to sell the Holcomb tract to Sengstacken and Smith, on May 17, 1905, for the sum of \$4400.00; that Sengstacken and Smith gave him their joint promissory note for \$100.00, payable in ten days, to bind the bargain; and that Hall, in return, gave them a receipt for \$100.00. Defendants claimed that the receipt set forth and contained the terms of their agreement.

Sengstacken's testimony on this question is set forth in full in the Transcript, on pages 307-308,

311-312, 326; Smith's, on pages 274-275, 292-293, and Hall's, on pages 229-233, 261.

The defendants did not introduce the receipt in evidence. And they did not show that it was lost and could not be found, or that it was executed or subscribed by the parties to be charged, or give the contents of its provisions.

Sengstacken said that the receipt was delivered to him by Hall. He then testified as follows (T., p. 311):

Q. Where is the receipt which was given you by John F. Hall on May 17, 1905?

A. I don't know. I have been looking for it, but I have been unable to find it. Since that transaction, I have moved my office three times. The last time I moved from Flanagan & Bennet Building, considerable of my old papers were in the back room and rained upon, and in moving into the new quarters where I am now, I destroyed considerable of my old records, which I thought were past age, and I had no further use for, and some without overhauling, and it is *possible* it may have been destroyed, *and it is possible I may have it yet among my papers*. At any rate, I haven't been able to locate it.

Q. Have you made a careful search for it?

A. I made *quite* a search.

The witness did not say that the receipt was lost or destroyed. He merely said that it was "possible" it might have been destroyed. And he thought that "it is possible I may have it yet among my papers." Why did he not search for it among his papers then? The fact that he thought that he might yet have it among his papers shows very plainly that he did not make a diligent search for it where he thought it might be found, or else he would have known that it was not there. And he did not say that he had made a careful search for it. He made "quite" a search. That might mean anything or nothing.

The law will not permit proof of contents of a lost instrument upon such a showing as presented by this witness' testimony. Before secondary evidence is admissible, it must first be shown that a bona fide search has been made for the lost writing, and "that the party has exhausted, to a reasonable degree, all the sources of information and means of discovery naturally suggested by the nature of the case, and accessible to the party."

The point is well illustrated by the case of *Blondeau vs. Sheridan*, 81 Mo. 545. In that case, the court said (p. 556):

" * * * Hastings testified as follows: 'I had the original contract handed to me by McGee. I don't know what has become of it; don't remember what I did with it; I may have the paper somewhere; I have looked for it.'

“Courts are not very strict in their rulings upon this question, but to permit copies or original papers to be read as evidence, on such foundation as that laid here would be in effect, to abrogate the rule altogether. There must be proof of such a search for the original, by the party who had custody of it, as reasonably warrants the conclusion that it has either been destroyed, lost or mislaid, and cannot be found. Where the witness states that he may have it in his possession it shows that, notwithstanding he has looked for it, he may, by a diligent search in the proper places, find it, and that the search he had made was by no means thorough or satisfactory to himself.”

Folsom's Ex. vs. Scott, et al., 6 Cal. 460.

Bascom vs. Turner, 5 Ind. App. 229.

Holbrook vs. School Dist., 28 Ill. 187.

Sengstacken's failure to show that the instrument in question was lost or destroyed, and could not be found by diligent search, therefore, renders inadmissible any secondary evidence concerning the alleged agreement.

Furthermore, it does not appear by the evidence that said receipt was subscribed by Hall as agent for the Herrmanns, or by Hall individually, or by any one, or at all. Hall testified, on direct examination (T., p. 231):

Q. Was there any written memorandum made at the time, signed by yourself, in the nature of a contract or receipt, or otherwise, with reference to this transaction?

A. I *made out* a receipt for \$100.00 on the purchase price of this particular tract of land.

To “make out” an instrument and to “*subscribe*” it are two different things. And neither Sengstacken nor Smith said that the instrument was signed.

This also precludes the right of consideration of secondary evidence regarding the contents of the alleged instrument.

“The loss of the paper is first to be proved; then the *execution* in the same manner as if produced.”

Shrowders vs. Harper, 1 Har. (Del.) 444.

“It is not competent to introduce testimony concerning the contents of a receipt, purporting to be signed by a party against whom it is set up as a matter of defense, in the absence of evidence tending to show the genuineness of the signature to the receipt.”

Holman vs. Borchers, 24 Mo. App. 629.

Helton vs. Asher, 103 Ky. 730.

Moor vs. Gray, 42 Me. 29.

Edwards vs. Noyes, 65 N. Y. 125.

Porter vs. Wilson, 13 Pa. St. 641.

Smith vs. Smith, 106 Ga. 303.

And defendants did not, in fact, prove a single term, condition or provision of the missing instrument. The witnesses testified concerning negotiations they claimed to have had before and at the time they entered into the alleged agreement, but they did not even attempt to state the language or give the substance of the contents of the alleged receipt or memorandum itself.

Hall testified as follows (T., p. 229):

Q. When were the final negotiations instituted resulting in this transfer?

A. It was in May, 1905.

Q. For the purpose of refreshing your memory as to dates, I hand you a promissory note taken from the possession of Henry Sengstacken, dated Marshfield, May 17, 1905, for \$100.00, payable to the order of Hall & Hall, and ask you to examine that and then state if you can say when the first negotiations were made resulting in the sale of this property?

A. Well, the negotiations probably a few days before this letter—before this note was made, but on this date we closed the deal; I sold the property, agreed to sell it to Sengstacken and Smith.

Mr. St. Rayner: Wait a minute, excuse me, I would like to know if there was any written agreement.

Court: Ask him about that.

Mr. St. Rayner: I object to any oral testimony being given of the nature of the sale of this property.

Court: He is not proving title, he is proving when negotiations began. This doesn't prove title, of course.

Q. Do you recognize this note?

A. I recognize this note, except this handwriting there; that wasn't made that day, but the note itself, I recognize the note as being—

Court: What date is that?

A. May 17, 1905.

Q. That is, the handwriting across the face, "Paid on purchase of land, Mrs. Dora Herrmann." You don't recognize that?

A. No, I don't recognize that; no.

Q. Where did you see that note before?

A. That note was given to me by Mr. Smith and Mr. Sengstacken on May 17, 1905.

Q. For what purpose?

A. On the purchase price of the Herrmann claim—the Holcomb claim.

Q. At what price?

A. \$4400.00.

Q. Was this note signed, and by whom?

A. Henry Sengstacken and L. D. Smith.

Mr. Peck. We offer the same in evidence.

Mr. St. Rayner: We object on the ground that it is incompetent.

Court: Objection overruled.

Mr. St. Rayner: It is not the best evidence of a transaction for the sale of realty, and is irrelevant in this case.

Court: The objection will be overruled and it will be put in the record.

Note marked "Defendant's Exhibit BB."
(Which is hereto attached and made a part hereof.)

Q. Was there any written memorandum made at the time, signed by yourself, in the nature of a contract or receipt, or otherwise, with reference to this transaction?

A. I made out a receipt for \$100.00 on the purchase price of this particular tract of land.

Q. Where is that receipt?

A. I gave it to Mr. Sengstacken, I haven't seen it since.

Q. Did he surrender it to you when the transaction was finally consummated?

A. He did not.

Q. Have you made a search for that paper?

A. I looked over my office and haven't got it there, and I don't have any recollection of his ever returning it to me; I don't think he did. In fact, I am positive it wasn't returned.

Q. *Were there any conditions attached to this sale of any nature?*

Mr. St. Rayner: I object to any testimony of an oral nature.

Court: I haven't seen the bill of complaint in this case, but I understand you are charging actual fraud; you are charging that this land was purchased by these people by actual fraud.

Mr. St. Rayner: We charge that they pretended to purchase the land on the 30th of August, 1905.

Court: This you charge was a fraudulent transaction?

Mr. St. Rayner: We also charge it as a fraudulent transaction, between a fiduciary agent—between a principal and agent. The agent reserving at the time of sale—

Court: You base your right to recover in this case solely on the fact that Hall was the agent of Mrs. Herrmann?

Mr. St. Rayner: No, that is only one of the grounds.

Court: The other ground is the actual fraud?

Mr. St. Rayner: The other ground is the actual fraud.

Court: Very well, then it is quite important that we should know all the facts, and this evidence is perfectly competent if that is the charge.

Mr. St. Rayner: What we object to in this, however, is for the defendant attempting to prove by oral testimony that there was an oral agreement between Mr. Hall, as attorney in fact of Mr. and Mrs. Herrmann, and Mr. Sengstacken and Mr. Smith, in selling this property. It is in contravention of the statute.

Court: Certainly it probably would not amount to a legal contract, but as a fact in this case, as it bears on the question of fraud, and for that purpose, it is competent.

Mr. Peck: *I will withdraw the question.*
Sengstacken testified (T., p. 307):

Q. Now relate, in your manner, the circumstances and facts surrounding the initiation and consummation of this sale of the Norman (Holcomb) tract to yourself and associates?

A. * * * I met Ren Smith in town one day. * * * So he and I went up to Judge Hall's office, and ascertained what he would sell it for, on terms of half down and half on

time. He said he would take \$4400.00, so we agreed to take it on the terms of half cash and half in one year, interest six per cent; and we at that time gave him our joint note, payable ten days after date for \$100, as part payment of the land.

Q. Is Defendant's Exhibit BB that note?

A. Yes, sir, that is the note.

Q. Did you make out that note?

A. I made that note out.

Q. And did you put the endorsement across the face here, "Paid by purchase of land. Mrs. Dora Norman?"

A. I did that when it was redeemed, yes.

Q. On August 30, 1905, did you make that endorsement?

A. Yes, when I got the note back. I don't know the exact date.

Q. Did you cut the signatures off that date?

A. I did. That is the way I generally cancel my notes; cut the name off.

Q. Whose names were signed to that note before you cut them off?

A. Henry Sengstacken and L. D. Smith.

Q. *Now, proceed with your testimony.*

A. *When we paid him the note, my recollection is that we took a receipt for \$100 on account, describing the land and the terms, and subsequent to that we proceeded to interest other people in the deal.* * * *

* * *

Q. Where is the receipt which was given you by John F. Hall on May 17, 1905?

A. I don't know. * * * It is possible it may have been destroyed, and it is possible I may have it yet among my papers. * * *

Q. Have you made a careful search for it?

A. I made quite a search.

And Smith testified as follows (T., p. 274):

Q. I hand you Defendant's Exhibit BB, and ask you if that is the note that you gave at that time?

A. Well, it must be. The signature is gone, but that is undoubtedly the note.

Q. Did any other papers pass between you and Mr. Hall, or Mr. Sengstacken and Mr. Hall, at that time?

A. Well, *I wouldn't know as to that, because I—so far as attending to the business, the legal part of it, I paid no attention to that whatever.* That has been a long time ago, and I *just presume* of course, that Mr. Sengstacken

took the proper papers, and that Mr. Hall being a lawyer too—*I didn't pay any attention to that part of it.*

This is the sum total of the evidence introduced by defendants to prove the alleged agreement. Can the court tell from this what the terms of the missing instrument were? Who were the vendors or vendees named herein? Was the land to be conveyed to Sengstacken and Smith, or to the Title Guarantee & Abstract Company? What was the consideration stated in the instrument? When was the contract to be performed? When was the first payment to be made? When were the deferred payments, if any, to be made? Were the deferred payments to be secured by a mortgage, or otherwise? And if they were to be secured by mortgage, who was to execute the mortgage—Sengstacken and Smith, or either of them, or the Title Guarantee & Abstract Company, or who? Were the vendors to execute a deed of the property, and, if so, what kind of a deed—a warranty, a bargain and sale, or a mere quitclaim? And who were to be the grantees named in the deed, if a deed was to be given—Sengstacken and Smith, or the Title Guarantee & Abstract Company, or who? And what were to be the covenants of the deed, and how many? And when was the deed to be delivered—when the purchase was fully paid, or when the first payment should be made, or when? And was the deed to contain any obligations or conditions to be carried

out by either the vendors or vendees, and, if so, what were they? The evidence is entirely silent on all these things.

Hall was asked if there were "any conditions attached to this sale of any nature." (T., p. 231-232.) And after counsel for complainant objected, counsel for defendants withdrew the question. *And no further question was asked witness on that subject.*

After testifying concerning negotiations he claimed to have had with Hall at the time he entered into the agreement, Sengstacken was then asked concerning the writing evidencing the alleged agreement, and he testified: "Q. Now proceed with your testimony." "A. When we paid him (Hall) the note my recollection is we took a receipt for \$100 on account, describing the land and the terms. * * * But the witness did not make known *what* the description and the terms set forth in the receipt were. He did not state either the language of the instrument or even the substance of its provisions.

And Smith admitted that "I didn't pay any attention to that part of it." (T., p. 274-275.)

This evidence is clearly not sufficient to prove a contract for the sale of land under our law. The Statute of Frauds of the State of Oregon provides that any agreement for the sale of real property, or any interest therein, is void, unless the same or

some note or memorandum thereof, expressing the consideration, be in writing and subscribed by the party to be charged or by his lawfully authorized agent. The statute further provides that no evidence of such agreement is admissible, other than the writing, or secondary evidence of its contents. (Lord's Oregon Laws, Sec. 804, 808. These provisions are set forth in full herein, on page 59.

And the rule is well established that the note or memorandum must be certain and definite in its terms and provisions in order to satisfy the requirements of the statute. The Supreme Court of Oregon has stated what is necessary for the memorandum to contain, in the case of *Catterlin vs. Bush*, 39 Or. 496, in the following language (p. 501):

“ * * * The statute requires that, in case of an agreement for the sale of real property or any interest therein, there shall be some note or memorandum thereof in writing, expressing the consideration and subscribed by the party to be charged, and no evidence will be received of such agreement, other than the writing or secondary evidence of its contents: *Hill's Ann. Laws*, Sec. 785. (Lord's Oregon Laws, Sec. 808.) The memorandum and the contract or agreement are not to be confounded as one and the same thing. The memorandum is understood to be a note or minute informally made of the agreement, which may have but a verbal existence, expressing briefly the essential terms,

and was never intended to stand as and for the agreement itself. The necessary elements are that it must contain the essential terms of the contract, expressed with such degree of certainty that it may be understood without recourse to parol evidence to show the intention of the parties. * * * Accordingly, *it must show who are the contracting parties, intelligently identify the subject matter involved, express the consideration, be signed by the party to be charged, and disclose the terms and conditions of the agreement.* * * *

Judge Valentine states the rule very clearly, in *Frye vs. Platt*, 3 Pac. (Kan.) 781, in the following language (p. 783):

“* * * the only evidence of the supposed contract between the plaintiff and the defendant, and the only instrument to which plaintiff is privy, is the receipt given by Eads to plaintiff; and this receipt, as a contract, is certainly very indefinite and uncertain. The receipt says: ‘*Received of J. B. Frye \$50, for part payment of purchase money for Sec. 1, T. 25, R. 14, Woodson Co., Kas.*’ Now what was the total amount of the purchase money? How was it to be paid? To whom was it to be paid? When was it to be paid? How was the deferred payment, or payments, to be secured? Was any interest to be paid, and, if so, at what rate? Nothing is shown with regard to these matters. The receipt is entirely blank with reference to

the consideration. But suppose that the consideration were considered definite and sufficient, and that at some future time it should be paid or tendered, then what should be done? Should a deed be executed for the land, or a release, or merely a receipt given for the money? And if a deed should be executed, then what kind of a deed—a quitclaim deed or a warranty deed? And what should be the covenants in the deed, and how many? And by whom should the deed be executed? * * *

In *Williams vs. Morris*, 95 U. S. 444, the court said (p. 456):

“Unless the essential terms of the sale can be ascertained *from the writing itself*, or by reference in it to something else, the writing is not a compliance with the statute; and, if the agreement be thus defective, it cannot be supplied by parol proof, for that would at once introduce all the mischiefs which the statute was intended to prevent. * * *

See also:

Ross vs. Allen, 25 Pac. (Kan.) 570.

Sheid vs. Stamp, 34 Tenn. 172.

Lippincott vs. Bridgewater, 55 N. J. Eq. 208.

And no less evidence of the contents of the written instrument, when the original is lost, will satisfy the demands of the law. The terms of the contract cannot be inferred, they must be affirma-

tively proved. The instrument must be substantially reproduced in all its essential parts.

Thus in *Tayloe vs. Riggs*, 1 Peters (U. S.) 591, Mr. Justice Marshall said:

“When a written contract is to be proved, not by itself but by parol testimony, no vague uncertain recollection concerning its stipulations ought to supply the place of the written instrument itself. The substance of the agreement ought to be proved satisfactorily; and if that cannot be done, the party is in the position of every other suitor in court who makes a claim which he cannot support. When parties reduce their contract to writing, the obligations and rights of each are described and limited by the instrument itself. The safety which is expected from them would be much impaired, if they could be established upon uncertain and vague impressions, made by a conversation antecedent to the reduction of the agreement.”

In *Carpell vs. Fagan*, 77 Pac. (Mont.) 55, the court said:

“* * * The word ‘contents’ used in this statute (the Oregon statute uses the same term) evidently includes all the substantial parts of the lost instrument, and therefore *proof of such contents requires a practical reproduction of the instrument in all its substantial parts*. The law is well settled that proof of negotiations and conversations and acts of the parties be-

fore, at the time of, and after the execution of the written instrument are not competent to prove its contents, where the instrument is lost.”

In *Scurry vs. Seattle*, 56 Wash. 1, the court said:

“* * * In order to establish a lost instrument on behalf of the party asserting rights under it, the evidence must be clear and positive, and of such a character as to leave no reasonable doubt as to the terms and conditions of the instrument. *It is not enough that it be established that an instrument containing some form of limitation at some time existed, nor is it enough that some witness is able to state his understanding of the legal effect of the instrument; the contents of the instrument must be substantially proven, and with such clearness that the court can determine its legal effect from the language used therein.*”

In *Edwards vs. Noyes*, 65 N. Y. 125, the court said:

“* * * Parol evidence to establish the contents of a lost deed should be clear and certain. *It should show that the deed was properly executed with all the formalities required by law, and should show all the contents of the deed, not literally, but substantially.* If anything less than these requirements would suffice, evil practices, which it was the object of the statute to prevent, would be encouraged.”

Nicholson vs. Tarpey, 89 Cal. 617.

McCarthy vs. Kyle, 4 Coldwell's Rep. (Tenn.) 348.

Rankin vs. Crow, 19 Ill. 626.

Hooper vs. Chism, 13 Ark. 496.

Applying these rules to the case at bar, the defendants herein have utterly failed to prove their alleged agreement. The writing itself evidencing the agreement was not introduced in evidence by defendants; they did not show its loss; they did not show that it was subscribed as required by the statute; and they did not show any of its terms, conditions or provisions. The agreement is, therefore, void under the statute of frauds. And defendants' contention that Hall contracted to sell the land in question to Sengstacken and Smith on May 17, 1905, and their further contention that Hall's duty to his principals ceased at that time by reason of that fact, is, therefore, without foundation or merit, and must, of course, fall to the ground.

Complainant further contends that defendants not only failed to prove their allegation respecting the agreement between Hall and Sengstacken and Smith, by showing a valid contract under the statute of frauds, but that their claims in respect thereto are absolutely false in fact.

This is shown by Hall's own letter to Mrs. Herrmann, written on May 19, 1905, two days after the alleged transaction is claimed to have been consummated. He wrote (T., p. 220):

"Hall & Hall,
Attorneys at Law,
Marshfield, Oregon.

May 19, 1905.

Mrs. Dora Herrmann,
Tedan Street,
Hildesheim, Hanover, Germany.

Dear Madam:

* * *

"* * * There is now considerable talk
about land and we have a good prospect of
selling the Holcomb tract for four thousand
dollars. * * *"

* * *

"HALL & HALL."

If Hall had contracted to sell the land to Sengstacken and Smith, on May 17, 1905, for \$4400.00, would he have written this kind of letter to his principal two days afterwards? If he had contracted to sell the land, then is the time he would have informed her of that fact. But he said nothing about having agreed to sell it to Sengstacken and Smith, or anyone else. He said that there was a "good prospect" to sell it, not because anybody had agreed to purchase it, but because "there is now considerable talk about land." Mr. Hall is a lawyer. He knew the meaning of the language and terms he used. He knew the difference between a *contract* and a mere "prospect." And if he had contracted to sell it for \$4400.00, he certainly would not have written Mrs. Herrmann immediately thereafter that there was considerable talk about land and that

there was a "good prospect" of selling it for only "four thousand dollars"—*four hundred dollars less than the alleged contract price.*

This letter shows why defendants were unable to produce the writing evidencing their agreement, and it explains why Sengstacken, Smith and Hall made such faint effort to find the missing instrument, and why they were unable to state its contents. Defendants' contract was a myth.

2. *But even if Hall had agreed to sell the land to Sengstacken and Smith, on May 17, 1905, as claimed by defendants, yet his duties in respect thereof would not have ceased or terminated at that time or by reason of that fact, and he was not at liberty thereafter, and before the deed of the property was executed and delivered, to speculate with the subject matter of his agency.*

Hall's duty did not cease until the purpose for which he was employed was fully performed and executed. In other words, his obligations did not terminate until he executed and delivered the deed conveying the land to the Title Guarantee & Abstract Company, trustee, and received payment therefor, on August 31, 1905. Hall was not a broker. He was not employed merely to find a purchaser. He was employed and authorized to both *sell and convey* the property of his principals. In the language of his power of attorney, the Herrmanns vested him with authority (T., p. 31-33).

“for them and in their names and as their act and deed to sign, seal, execute, deliver and acknowledge such deeds, covenants, indentures, agreements, mortgages, * * * bonds, notes, receipts, evidences of debts, releases and satisfaction of mortgages, * * * and other instruments in writing of whatever kind and nature.

“Giving and granting unto our said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes as they might or could do if personally present, * * *”

And Hall did, in fact, perform other acts in furtherance of his agency after May 17, 1905. Subsequently, he executed and delivered the deed to the Title Guarantee & Abstract Company, trustee. He also executed covenants of warranty and against encumbrances, obligating his principals to respond thereto. And he accepted part of the purchase price of the property, and the note and mortgage of the Title Guarantee & Abstract Company, trustee, for the balance thereof. And it is by reason of these very acts performed by Hall, all subsequent to the time that defendants assert that his duties as agent ceased, that defendants themselves are now claiming title to the land. If Hall's obligations terminated at the time contended

by defendants, then all his subsequent acts must have been without authority and void.

Nor were Hall's duties after the time of the alleged agreement (assuming that there was in fact an agreement as alleged) merely passive and formal. They were both active and potential. He was bound to be vigilant in safeguarding the interests of his principals in the performance or execution of the contract itself. It was his duty to keep intact the title of the property to abide the obligations of the agreement. He was bound to see that the obligations of his principals were not increased, and that the prospective vendees did not escape performance of any of their covenants. He was bound to see that no covenant, undertaking or condition on behalf of his principals was embodied in the deed which was not required by the contract. It was his duty, if the agreement was procured by any species of fraud or misrepresentation, to repudiate and refuse to carry it out, on behalf of his principals. And if, for any reason, the intending purchasers were unable to perform, or the contract could not be enforced against them, then it was Hall's duty to sell the land to someone else at the best price obtainable, when opportunity offered. It was also his duty to execute and deliver a deed and to accept the purchase price, in conformity with the exact obligations of the contract. In short, Hall was bound to act as faithfully and diligently in the interests of Mr. and Mrs. Herrmann as if he were

selling his own land—"to do and perform all and every act and thing whatever requisite and necessary to be done in and about the premises, as fully and to all intents and purposes as they might or could have done if personally present."

The rule of law applicable is well stated in the case of *Wing & Evans vs. Hartupee*, 122 Fed. In that case, Hartupee, while acting as agent and trustee for the sale and conveyance of certain stocks and bonds of the Pittsburgh Plate Glass Company, contracted to sell a certain portion of such stocks to one Pitcairn. Subsequently, but before the contract was performed and the stock delivered, Pitcairn agreed to re-sell a portion thereof back to Hartupee. The court said (p. 900):

"It need scarcely be said that defendant Hartupee could not have bought the stock directly from himself as trustee, except with the consent of all persons interested therein. The equitable rule that makes a purchase voidable at the option of the *cestui que* trust is founded on policy, and does not involve or compel an inquiry into the good faith of the transaction.

* * *

* * *

"There are hosts of authorities to support this proposition, but it is enough to cite the absolutely considered case of *Michoud vs. Girod*, 45 U. S. (4 How.) 503, 11 L. Ed. 1076.

“A slight extension of the rule is sufficient to cover such a case as is now presented, and, in our opinion, such an extension is justified by the same consideration of policy that moved the courts to lay down the rule originally. Where the legal title of the trust property still remains in the trustee, so that his duty of care, protection and oversight continues, we think he should be disabled from acquiring that title for himself, *even though he may have agreed to sell it to a third person, and by a subsequent contract with such person may have taken the conveyance of his equitable right.* The danger in such a transaction differs little in degree from the danger that lurks in a sale directly by the trustee to himself; and the uncovering of fraud, if fraud there should be, in the formal sale and purchase, would be nearly as difficult in the one case as in the other. Indeed, it might be more difficult, for, supposing fraud to exist, the conspirators would be likely to support it by their oaths, and the good faith of the transaction would therefore be sworn to by two false witnesses, instead of by one only. The duty of a trustee does not cease when he has made an agreement to sell the trust property. Until the contract is executed and the conveyance actually made, his obligation is not merely passive and formal, but continues to be active and imperative. He must still preserve and care for the trust estate, so that it may be forthcoming to answer the agreement; and he is bound also to be vigilant concerning the agree-

ment itself, so that the intending purchaser may neither evade his own obligations, nor improperly increase the obligations of the trustee. *So long as the agreement is executory*, there is a necessary and wholesome relation of hostility between the purchaser and the trustee, which should not be diminished, but would inevitably disappear altogether the moment the trustee himself became interested in carrying the agreement into effect. Suppose the contract had been procured by fraudulent representations on the part of the purchaser, or that, for any other legal or equitable reason, the trustee would not only be justified in opposing, but required to oppose, its execution. Under such circumstances, he would obviously be taking a position antagonistic to his duty, if he were permitted to engage his personal interest on the side of the purchaser. Moreover, there are such things as tacit understandings, insidious suggestions, hints that are sufficient between shrewd and unscrupulous men, that never reach the stage of agreements, and are yet of potent force and effect. It is obviously safer to disable a trustee from profiting by such undertakings, than to expose him to the temptation of misconduct that would be so difficult to expose, and to lay upon the cestui que trust a task, which would often prove impossible, of tracing the hidden course of an ingenious plot purposely kept vague and ill defined.

“ * * * We do not deny that there is an appearance of arbitrariness in drawing the line at the passing of the legal title, disregarding what may be the real and substantial agreement; but as the rule disabling a trustee from dealing with the trust property for his own advantage is founded on policy, and not upon logic, the mere appearance of arbitrariness need not be alarming. *It is a working rule that is needed—one that is convenient and safe to apply*—and, after much consideration, we think the test that had been indicated, namely, *whether the legal title has or has not passed, should determine what action a court of equity must take when it appears that a trustee has repurchased an interest in the trust estate from the person to whom the interest has been sold. If the legal title has not yet left the trustee, the contracts between the parties having dealt with the equitable title only, the transaction is voidable at the option of the settlor or trust, without inquiry into its good faith.* If the legal title has passed, however, and was then reconveyed, the question is one of fairness and good faith, to be inquired into in the light of the circumstances of the particular case.”

See also:

Cook vs. Berlin Woolen Mills, 43 Wis. 433.

Parker vs. McKenna, L. R. 10 Ch. App. 96.

In the case at bar, the defendants themselves expressly admit that Hall had an understanding with

Sengstacken, who was acting on behalf of the purchasing syndicate, that Hall was to have an interest in the land, before he delivered the deed conveying the same to the Title Guarantee & Abstract Company, trustee. In the first Answer that defendants filed herein they allege (T., p. 410):

“On August 30, 1905, defendants Sengstacken and Smith reported to John F. Hall that they had formed a syndicate or pool to take over their agreement with him in the matter of purchasing said land, and that said syndicate or pool was made up of the following members, with the following proportionate interests:

J. J. Clinkinbeard.....	two-twelfths
L. D. Smith.....	three-twelfths
Henry Sengstacken.....	three-twelfths
S. C. Rogers.....	(two) one-twelfth
D. L. Rood.....	one-twelfth

making in all eleven-twelfths, and the said defendants, Sengstacken and Smith, requested the said John F. Hall, in lieu of commissions in part to take the remaining one-twelfth interest in said syndicate; the said defendant did take a one twenty-fourth interest with the stipulation that James T. Hall, his brother, should likewise take a one twenty-fourth interest; *thereupon* the interest of said Dora Norman Herrmann and this complainant in said lands was transferred by John F. Hall, their attorney in fact, to the Title Guarantee & Abstract

: Company, a corporation, trustee, *to hold the same in trust for the several aforementioned owners of said syndicate in proportion to their respective interests.* * * * ”

See also defendants' second answer, T., p. 61-64. And Henry Sengstacken testified as follows (T., p. 332):

Q. Well, *after* you had agreed with him (Hall), or he had agreed with his brother, and announced to you that he and his brother would take the one-twelfth, *then you closed the transaction, and executed the deed and mortgage. Is that true?*

A. *Yes, I guess that is correct.*

Thus it is admitted that it was agreed that Hall should have a joint, undivided interest in the land with the other members of the syndicate, before he executed and delivered the deed thereof, on behalf of his principals, to the Title Guarantee & Abstract Company, trustee; that he took his interest directly under and by virtue of the deed which he himself executed in the names of his principals; and that he himself paid part of the purchase price therefor.

The case at bar, therefore, falls squarely within the rule stated in *Wing & Evans vs. Hartup* and the rules hereinbefore stated prohibiting agents from speculating with the property entrusted to them for sale.

III.

The Court Erred in Holding That None of the Other Members of the Purchasing Syndicate, Except Sengstacken, Knew of the Understanding Between Sengstacken and Hall, Whereby It Was Agreed That Hall Should Have a Share in the Syndicate and a Joint Undivided Interest in the Land, Until After the Delivery of the Deed to the Title Guarantee & Abstract Company, Trustee, and That, Therefore, "They Should Not Be Affected Thereby."

1. *The other members of the syndicate were impressed with constructive notice.*

It is immaterial whether the other members of the syndicate knew of the unlawful understanding between Hall and Sengstacken until after the execution and delivery of the deed to the Title Guarantee & Abstract Company, trustee, or not. They were all impressed with constructive notice.

The record shows that Sengstacken and Smith organized the syndicate. They determined who its members should be. They solicited all the other parties to join. They represented it in all negotiations for the purchase of the land. They fixed the terms of sale with Hall. They examined and accepted the title. They caused the note, mortgage and deed to be executed and delivered. In short, Sengstacken and Smith acted for and on behalf of the other members of the syndicate in everything that was done, both in organizing the

syndicate itself and in purchasing the land. (Answer, T., p. 61-64.) The other members, namely, Rogers, Rood and Clinkinbeard, did nothing more than pay for their respective interests therein, after Sengstacken and Smith negotiated the deal. They had nothing whatever to do with the organization of the syndicate, other than that they agreed to pay for their shares after the purchase should be effected. They had nothing to say as to who the other members of the syndicate should be. And they took no part in the negotiations resulting in the purchase of the land. In fact, they knew little about the deal, except what Sengstacken and Smith reported to them. And they relied upon Sengstacken and Smith in everything that was done pertaining to the transaction. (Clinkinbeard's testimony, T., p. 366; Rood's testimony, T., p. 373-374; Rogers' testimony, T., p. 346-347.)

It is immaterial, therefore, whether the other members of the syndicate knew of the understanding between Sengstacken and Hall or not. They were affected by Sengstacken's act and by his knowledge, whether he informed them thereof or not. The rule is well settled that where one of two or more joint purchasers represents his associates as well as himself in effecting or consummating a purchase for their mutual benefit, the associates are affected with notice of any fact concerning the transaction that comes to the knowledge of the one making the deal.

The rule is well illustrated by the case of McLean vs. Clark, et al., 47 Ga. 24. In that case, McLean sued Clark, Harris and Steadman for the value of certain factory machinery and other property. Plaintiff charged that Clark procured the sale to himself, Harris and Steadman through fraud, etc. All negotiations for the sale were conducted by and between McLean, the vendor, and Clark, on behalf of himself and his associates.

The question of notice was raised by an instruction requested and refused by the trial court.

On appeal, the court said (p. 69-70):

“5. When other persons are let into a trade, made, in form, in the name of another, but, in fact, in consultation with them, and in view of their joint interest, they stand on a different footing from purchasers from the nominal vendee. This is only common sense. Neither equity nor good morals care for the form in which parties see fit to clothe their transaction. *If Clark, Harris and Steadman had consulted together and contemplated a joint purchase, and it was understood they should be jointly interested, and Clark made the purchase, practicing a fraud in so doing, they all take the title tainted with the fraud.* The subsequent arrangement is merely in pursuance of the first understanding. We do not say there was a fraud (the court merely passed upon the correctness of the instruction requested and refused), but if there was, it would be a very

dangerous doctrine to hold that, because they all did not participate, the sale is good as to those who are not to blame. Clark was in fact agent for all. Under the facts proven, it would have been gross bad faith to participate in Clark's purchase, if it was fair. In equity, therefore, he acted for all, for himself and as agent for the others."

See also:

Smith vs. Adams, 4 Tex. Civ. App. 5.

Stanley vs. Green, 12 Cal. 149.

Atterbury, et al., vs. Hopkins, et al., 122 Mo. App. 172.

Richards, et al., vs. Sutter, 125 S. W. (Ark.) 1018.

And in the case at bar, would it not be absurd to say, and a most dangerous doctrine to hold, that the other members of the syndicate should not be affected by the unlawful act of Sengstacken in inducing Hall to commit a fraud on his principals in bringing about the sale for their joint and mutual benefit, merely because they were not informed of the fraud until after the deed was delivered to their trustee? If that were the law, then all that would be necessary to enable a man to defraud another of his property would be for him to have someone else negotiate the transaction for him, and then plead ignorance of his representative's acts.

Furthermore, it cannot be denied that all the members of the syndicate shared the profits of the

purchase effected by Sengstacken and Smith. They are, therefore, bound, if they seek to avail themselves of the benefits of the transaction, to take it tainted with whatever fraud was practiced or undue means employed in bringing about the sale. This is nothing more than justice and common sense.

The rule is stated by the Supreme Court of Oregon, in *Wilson vs. McCarthy*, 134 Pac. (Or.) 1189, in the following language:

“The doctrine is well established and rests upon sound principles of law that a person who seeks to avail himself of the contract made by another for him, whether by appointment or by a self constituted agent, is bound by the representations made and the methods employed by the agent to effect the contract.”

See also:

Presby. vs. Parker, 56 N. H. 409.

Darner vs. Brown, 137 N. W. 461.

Harrell vs. Brooks, 113 S. W. 961.

Krum vs. Bench, 96 N. Y. 398.

Morse vs. Ryan, 26 Wis. 356.

2. *And the Title Guarantee & Abstract Company, trustee for the syndicate, had notice of the understanding between Hall and Sengstacken, at the time the deed was delivered to it. The members of the syndicate were also impressed with notice by reason of that fact.*

It is alleged by defendants that they agreed among themselves, before the sale was made, that the Title Guarantee & Abstract Company should receive and hold the title of the land for their benefit. (Answer, T., p. 62.) And it was conveyed to that company in accordance with such understanding. It is also admitted that Henry Sengstacken was president and general manager of the Title Guarantee & Abstract Company at the time, and that he represented it in the transaction in question. (Sengstacken's testimony, T., p. —.) Therefore, what Sengstacken knew regarding the sale, the Title Guarantee & Abstract Company was impressed with notice of. And notice to the Title Guarantee & Abstract Company, trustee, was notice to its cestuis que trust, the members of the syndicate.

The rule is elementary that notice to a trustee of any fact affecting title of property is notice to the beneficiary.

Meyers vs. Ross, 40 Tenn. 59.

Pope vs. Pope, 40 Miss. 516.

Houston Co. vs. Haden, 135 S. W. (Tex.) 1149.

Schofield vs. Cogdell, 113 S. W. (Tenn.) 375.

3. *Defendants claim that all the other members of the syndicate assigned their interests in the land to Sengstacken, Smith and Siglin, who now claim to be the owners thereof. The property is, therefore, subject to all the equities of complainant in their hands, regardless of the fact whether such*

other members had notice of the fraud practiced in effecting the sale to the syndicate or not.

Sengstacken and Smith negotiated the purchase with Hall from complainant and his wife. They caused Hall to violate his trust to his principals in making the sale of the land to themselves and their associates. Sengstacken and Smith now claim to own eleven-twelfths of the property, by virtue of assignments of the interests of the other members of the syndicate to themselves, together with Siglin, who claims to own a one-twelfth interest therein.

Under these circumstances, the land claimed by Sengstacken and Smith is held subject to all the rights and equities of complainant therein. The rule is well established that where the title of property after a transfer, even to an innocent purchaser, re-vests in the original fraudulent grantee, the equitable rights of the original owner re-attach to it in his hands.

O'Dell vs. Rogers, 44 Wis. 136, 180.

Oliver vs. Piatt, 3 How. (U. S.) 479, 485.

Bourquin vs. Bourquin, 120 Ga. 115, 117-119.

Trentman vs. Eldridge, 98 Ind. 525.

Johnson vs. Gibson, 116 Ill. 294.

Talbert vs. Singleton, 42 Cal. 390.

Church vs. Church, 25 Pa. St. 278.

Bank vs. Wilcox, 24 Wis. 671.

Would it not be absurd to say that Sengstacken and Smith should be protected in the possession of

the proceeds of the unlawful transactions which *they* negotiated, merely because their associates and partners in the transaction, whose interests in the ill-gotten gains they are now claiming by virtue of subsequent assignments, were not aware of the manner in which *they themselves* effected the sale? Yet that is the position assumed by defendants in this case.

And defendant Siglin is not an innocent purchaser. Defendants allege in their Answer (T., p. 67):

“That the interest of D. L. Rood was thereafter, for a valuable consideration, acquired by defendant Z. T. Siglin without any knowledge whatever of the facts or circumstances in the matter of the acquisition of the Hall & Hall interest heretofore alleged.”

The evidence, however, does not show that Siglin paid anything whatever for his interest. His testimony is entirely silent on that subject. (T., p. 352-355.) Furthermore, Siglin testified, on cross-examination, that “when he bought his interest in the Norman (Holcomb) tract he was *not positive* who the other owners were” (T., p. 353); *that he did not know whether Hall had an interest in it or not*” (T., p. 353); “that he *made no investigation* to find out who owned the property” (T., p. 353); “that he *thought* that the Title Guarantee and Abstract Company was holding the title to this property as trustee, when he bought his interest” (T., p.

353-4); "that he *thinks* he bought his interest in 1909" (T., p. 354); and that "he *thinks* he got an assignment of the certificate from the Title Guarantee and Abstract Company, showing his interest." (T., p. 354.)

This evidence does not show Siglin to be a bona fide purchaser. The rule is elementary that to entitle a person to the protection of a court of equity, on the ground that he is an innocent purchaser, he must allege and prove that he acquired the property without notice of the rights of the complainant therein; that he paid a valuable consideration therefor, and what the consideration was; and that he acquired the property in good faith. And if he fails to establish or prove any of these things, he cannot be considered an innocent purchaser.

II Pomeroy's Eq. Jur. (1886 Ed.), Secs. 745, 785.

The rule is stated in *Boone vs. Chiles*, 10 Pet. (U. S.) 177, in the following language:

" * * * In setting it up by plea or answer, it must state the deed of purchase, the date, parties, and contents briefly; that the vendor was seized in fee, and in possession; the consideration must be stated, with a distinct averment that it was *bona fide* and truly paid, independently of the recital in the deed. Notice must be denied previous to, and down to the time of paying the money, and the delivery of the deed; and if notice is specially charged, the

denial must be of all circumstances referred to, from which notice can be inferred; and the answer or plea show how the grantor acquired title. * * * The title purchased must be apparently perfect, good at law, a vested estate in fee simple. * * * It must be by a regular conveyance; for the purchaser of an equitable title holds it subject to the equities upon it in the hands of the vendor, and has no better standing in a court of equity. * * * Such is the case which must be stated to give a defendant the benefit of an answer or plea of an innocent purchaser without notice; the case stated must be made out, evidence will not be permitted to be given of any other matter not set out."

Richards vs. Snyder & Crews, 11 Or. 501.

Hyland vs. Hyland, 19 Or. 51.

It requires no argument to show that neither defendant Siglin's averment nor his testimony entitle him to be considered an innocent purchaser under the requirements of these authorities.

We therefore respectfully submit that Christian Herrmann is entitled to the relief prayed for in his Bill of Complaint, and that the trial court erred in dismissing the same.

ROBERT J. UPTON and
ST. RAYNER & ST. RAYNER,
Solicitors for Appellant.

No. 2371

IN THE

United States Circuit
Court of Appeals

Ninth District

CHRISTIAN HERRMANN,
Appellant

vs.

JOHN F. HALL, et al,
Appellees

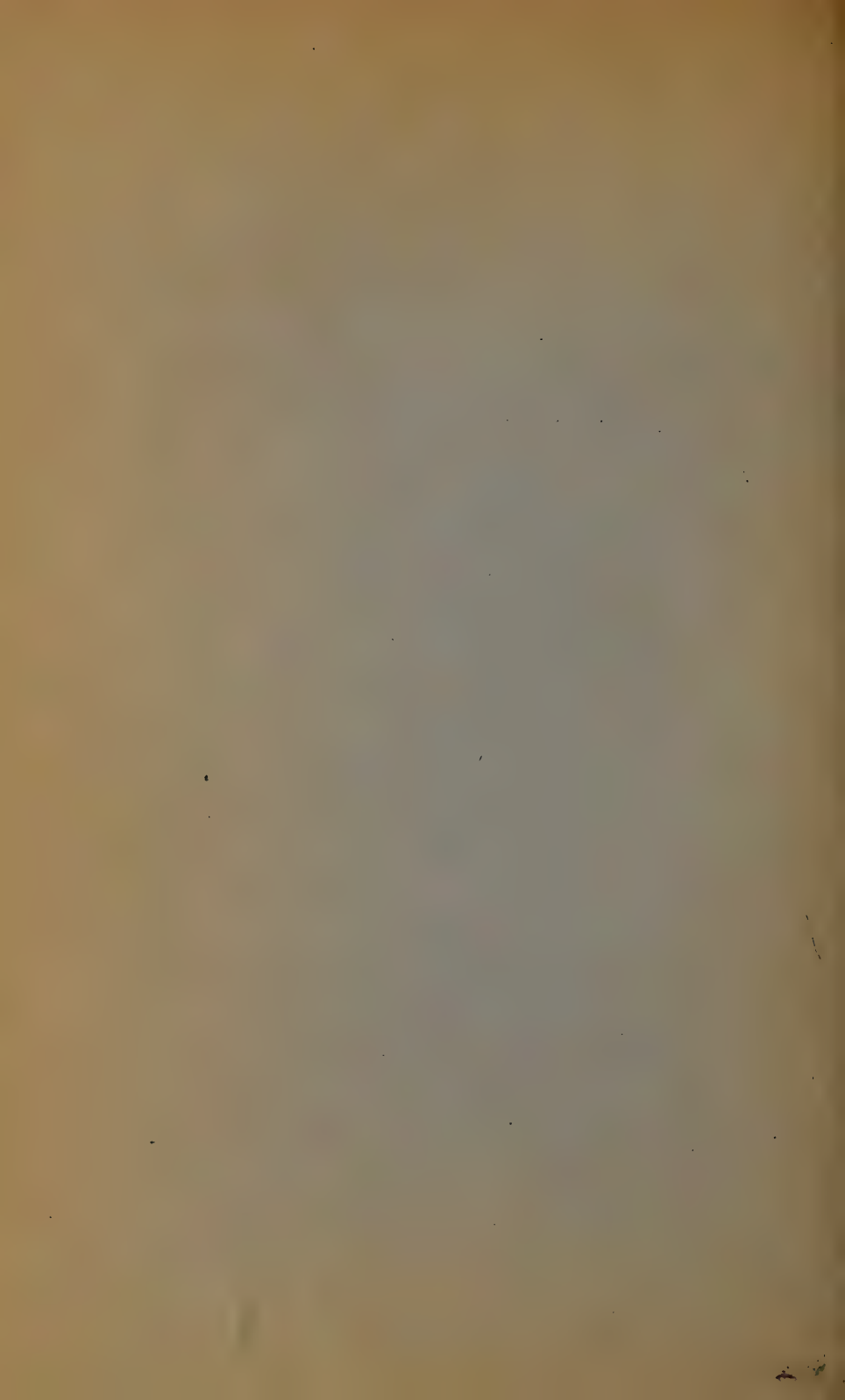
Appeal from the District Court of the United
States for the District of Oregon.

Brief of Appellees

C. R. PECK,
Marshfield, Oregon

C. A. SEHLBREDE,
Marshfield, Oregon
Solicitors for Appellees

FILED



IN THE
United States Circuit
Court of Appeals

Ninth District

CHRISTIAN HERRMANN,

Appellant,

vs.

JOHN F. HALL, MARY HALL, his
wife, L. D. SMITH, ROSA M.
SMITH, his wife, HENRY SENG-
STACKEN, AGNES R. SENGSTACK-
EN, his wife, Z. T. SIGLIN, J. J.
CLINKENBEARD, PHILURA CLINK-
ENBEARD, his wife, S. C. ROGERS,
DELIA M. ROGERS, his wife, D.
L. ROOD, ELLA M. ROOD, his wife,
JAMES T. HALL, ALICE HALL, his
wife, WILLIAM O. CHRISTENSEN,
MATTIE CHRISTENSEN, his wife,
TITLE GUARANTEE AND ABSTRACT
COMPANY, a corporation, trustee,
TITLE GUARANTEE AND AB-
STRACT COMPANY, a corporation,

Brief
of
Appellees

EAST MARSHFIELD LAND COMPANY, a corporation, EASTSIDE LAND COMPANY, a corporation, ANDREW MASTERS, CHARLES H. CURTIS, ANNA JOHANSEN, JOHN WALL, MARY PENNOCK, ARTHUR B. SANDOHL, W. R. HAINES, and LOUIS B. HAINES, HARVEY SMITH, GEORGE CLINKENBEARD, ANNA D. CLINKENBEARD, CHAPMAN L. PENNOCK, ARNE P. HUSBY, A. E. CAVANAUGH, M. A. McLAGGEN and MINNIE McLAGGEN, FIRST TRUST AND SAVINGS BANK OF COOS BAY, a corporation, J. W. VINGARD, MARY A. PETERSON, DORIS L. SENGSTACKEN, VICTOR ALTO, L. GRAYCE GOULD, CORNELIUS WOODRUFF, WILLIAM L. LEATON, JOHN F. BANE, A. W. NEAL, A. R. WELCH, WILLIAM VAUGHN, WILLIAM H. PAYNE, HILDA FREDERICKSEN, ELIZABETH SCHIEFFELE, ANTHONY STAMBUCK, GEORGE H. ELLIOTT, NELLIE CHANDLER, T. V. JOHNSON, LISI ALTO, J. T. HERRETT,

Appellees.

Appeal from the District Court of the United States for the District of Oregon.

BRIEF OF APPELLEES.

STATEMENT OF THE CASE

This is a suit instituted by Christian Herrmann, the Appellant herein, as the sole heir of his deceased wife, Dora Norman Herrmann, to recover certain lands in Coos County, Oregon, which are described in the evidence as the "Holcomb Claim" or the "Norman Tract."

This land was owned by Dora Norman who lived in the vicinity of the land until 1901 when she removed to Germany and thereafter in 1902 married the Appellant herein, Christian Herrmann.

Dora Norman Herrmann was a woman who looked after her business affairs to the minutest detail and was exceptionally shrewd in the conduct of her property. This is disclosed from a consideration of the correspondence between Dora Norman Herrmann and Defendant, John F. Hall, who was her attorney in fact in Marshfield, Oregon, and was her agent in charge of her property. It is hardly possible to understand this case thoroughly unless the correspondence between Mrs. Herrmann and Mr. Hall is considered carefully. (T., P. 184 to 226, and 90 to 115.)

Mrs. Herrmann was very anxious to dispose of her lands in Oregon, including the lands in controversy, and again and again wrote to her agent, Defendant Hall, urging him to negotiate a sale for the property, fixing the price, and berating him for the fact that he had not theretofore been able to make a sale. The relation between the parties on this point is best shown by excerpts from the correspondence which bear upon the question in litigation; on January 1st, 1902, Mrs. Norman wrote to Defendant Hall: "Cannot you to sell some property of mine. I read in the paper that it is such a good time for selling land. Please try your best." (T., p. 190); again on June 22nd, 1902, she writes: "Can you sell any land for me? Please try what you can do. I like to sell everything out." (T., p. 188); again on August 15th, 1903, she writes: "I hope that in the course of the summer you will succeed in selling my hotel with the remainder of the lands. Please give me the exact information about everything, how the things are in my favor or to the contrary and if I may hope to succeed in selling all my property in your country there? Is there no chance that you can sell my lands on your own account without sending the deed here, if we can give you a general power of attorney, as our authorized representative?" (T., p. 201); which last letter is signed

by both Mrs. Herrmann and the Appellant herein; again on February 21st, 1904, Mrs. Herrmann wrote: "Please do try to sell something and do write. What is the reason that you do not get to sell anything? Is the price too high or is there anything else the matter? * * * *
 Besides do also let me know how it is that Holcomb's Claim, you never told me about it and I wish to know if Henry is still willing to take the land." (T., p. 204); to the last letter the defendant Hall replied on May 7th, 1904: "The Holcomb property, as we wrote you before, was sold under execution, and we bid it in again for you and the sale was confirmed at the last term of the Circuit Court, this last week, you will get a second deed for same in four months, then your title will be good. The Court allowed us \$150.00 for attorney fees in the foreclosure proceedings. We have not taken anything out of your rent, but will wait a while, and see if we can sell the property." (T., p. 205); on May 12th, 1904, Dora Herrmann wrote to Defendant Hall: "Do write whether you did not sell any land or the house yet. We should like so much to know what is the reason that you did not sell anything, as you always promised to do so. Is the price too high? Or what is the reason? Do write about everything. How is it with the Holcomb's Claim? I read in the newspaper that the sale is

confirmed, but I never get any answer about that from you." (T., p. 207); to which last letter Defendant Hall replied on June 1st, 1904: "We could not sell your land, have done the best we could, the only people who are buying land are speculators. They want to get the land for nothing so as they can sell at a big price." (T., p. 208.) Again on July 7th, 1904, Defendant Hall wrote Mrs. Herrmann: "In regard to the Holcomb Claim the sale has been confirmed and you will get a new deed in the latter part of August. After this your title will be perfect. Times are pretty dull here at present, in fact there is no demand for property. We will do our best to make a sale." (T., p. 210); Again on August 3rd, 1904, Defendant Hall wrote as follows: "In the matter of the Holcomb Claim, as we wrote you before, the time for the Sheriff's deed will not expire until about the 27th of August. We have an offer of \$3500.00 for the land provided the party that makes the offer can dispose of some property he owns in Portland. We told him we had your power of attorney, but would not make any promise concerning the price of the land until we heard from you. You will please let us know your lowest cash price for the land, also your lowest price one-half cash and one-half on time." (T., p. 212); to which last letter Mrs. Herrmann, on August

29th, 1904, replied: "In the matter of the Holcomb Claim, I consent to sell it \$4000, see what you get, if he does not agree with this, you could arrange the matter so that the 500 dollars are divided, he giving 250 dollars more and I only 3750 instead of 4000 dollars to receive. I hope that the deed for the claim will be all right." (T., p. 214). On November 17th, 1904, Mrs. Herrmann writes: "And did you get the deed from Holcomb? Please do take pains to sell something of my property, you always promise but that is all, and I should like it so much.

* * * * And once more, do try as much as possible to sell something, you would oblige me so very much by it." (T., p. 216); to which letter, on January 28th, 1905, Mr. Hall replied: "We have the Holcomb matter so that we can get a Sheriff's deed at any time. * * * We are trying to sell the Holcomb land for four thousand dollars if that is satisfactory to you, but do not know whether or not we can do it. Times are pretty dull here just now, only the North Bend and Porter Mill running." (T., p. 217). To which last letter Mrs. Herrmann replied on April 13th, 1905: "I shall be contented if I get 4000 for the Holcomb place. * * * I hope that next time you will be able to give me very good news, that you have sold something, or that you have got the money." (T., p. 219); and in

reply Mr. Hall, under date of May 19th, 1905, wrote: "There is now considerable talk about land and we have a good prospect of selling the Holcomb tract for four thousand dollars." (T., p. 221); on June 12th, 1905, Mrs. Herrman replied: "I am also satisfied with the sale of the Holcomb land for 4000 dollars. You would really oblige me very much if you would apply to the affair very energetically, that now at length all my possessions there would be sold." (T., p. 222); to which Mr. Hall, on August 12th, 1905, wrote: "The Holcomb claim, I guess, is sold. The parties have agreed to take the same, and the abstract is now being made, and unless the parties go back on the bargain, we will be able to close the deal about the 1st of September." (T., p. 92.) On August 31st, 1905, Mr. Hall wrote to Mrs. Herrmann as follows: "Enclosed herewith find check for the sum of \$1694.00. We have sold the Holcomb land for \$4000.00 net above commission, and our fee for foreclosing the mortgage. Have taken a mortgage for \$2200.00, payable one year after date at six per cent per annum. Will take payments at any time for \$100.00 and upwards.

We retain a sufficient sum to pay the taxes against that and all other property, together with the cost of abstract, and remit balance received herewith." (T., p. 90.)

The letter last above quoted was received by Mrs. Herrmann in Germany on the date of her death; to the last quoted letter, Christian Herrmann, the Apellant herein, replied, on November 8th, 1905: "I am very satisfied also concerning the Holcomb claim, that it has been sold.
* * * * Please inform me which of the claims not yet sold belongs still to my wife's property, and at what price you think that you could get rid of them." (T., p. 94.)

From a consideration of the above correspondence it will be seen that Dora Norman Herrmann was very anxious to sell the property in question and that she was continually nagging the Defendant Hall to make a sale of the same, and chiding him for not doing so. It will also be observed that it was at her suggestion that the power of attorney was given to Defendant Hall, that she fixed the price of the property without suggestion from the Defendant Hall and that the Defendant Hall sold the same for her at a price which would net her the amount which she asked for the property, after deducting all expenses of the sale, together with an attorney's fee due Hall, for the foreclosure of a mortgage on the property. If there had been any disposition on the part of the Defendant Hall to abuse the confidence of Mrs. Herrmann he could just as well have sold the property for

four thousand dollars including these expenses. And it might be well to remark at this time that a careful examination of the evidence in this case will disclose that the Defendant Hall has been a careful, considerate and pains-taking agent in connection with all the matters entrusted to him by Mrs. Herrmann. Defendant Hall, as the evidence shows, is fifty-six years of age, and County Judge of Coos County, Oregon, having held that office for nearly eight years, and prior to that time was County Surveyor for said County for four years; that he is an old-timer in Coos County and was acquainted with Dora Norman Herrmann from 1878 until the time she left for Germany.

At the outset this case should be distinguished from nearly every case which has been relied upon by Appellant as a precedent in this, to-wit: *There is no actual fraud in this case.* The lands were sold by Defendant Hall at the best price obtainable by him at the then reasonable market value. As the learned trial Court well said in his opinion in this case: "There is nothing in the record to support the charge of actual fraud made in the bill. On the contrary, the facts clearly show that the sale of the property in controversy by Hall, as attorney in fact for Mrs. Herrmann, was entered into by all the parties connected therewith in the utmost good faith. It

was made for four hundred dollars more than the price fixed by Mrs. Herrmann, and for its full market value at the time. * * * Numerous witnesses familiar with real estate values have testified that the property sold for the full market value, and this is apparent from the fact that Defendants Sengstacken and Smith contracted for its purchase in May, 1905, but hesitated to pay the entire purchase price, although amply able financially to do so, because it was considered a hazardous speculation. They therefore endeavored and promoted a syndicate to take the title and handle the property and it was only after considerable effort and the refusal of several speculators and dealers in real estate to join in the venture, that they were able to interest four of their neighbors and friends in the venture. If the property had been worth what the Appellant now claims it to have been, it is highly probable that Sengstacken and Smith would have readily taken the entire contract, or in any event they would have had difficulty in interesting others in the proposition. I take it, therefore, that question of actual fraud is out of the case and the only point is the legal effect of Defendant Hall's connection with the transaction." (T., P. 80.)

And to the above finding of the trial Court, no specific exception is taken on this appeal,

and the opinion of the Court in that regard and must be regarded as uncontroverted and undisputed. But by reason of the fact that the pleadings in this case and the brief of the Appellant contain so many suggestions of actual fraud, it is necessary to impress upon the Appellate Court the fact that the question of actual fraud is no longer in the case and we are dealing on this appeal only with the cold-blooded legal effect of the act of an agent honestly executed in behalf of his principal.

Appellant has gone into the evidence somewhat with reference to conditions existing after the date of the sale, but inasmuch as such conditions could only bear on the question of actual fraud, we must protest that the brief of counsel in that respect is irrelevant and immaterial.

The only facts and circumstances material upon this appeal are those which surround the actual consummation of the sale in determining exactly what was done or left undone by Defendant Hall, in order that we may ascertain the facts to which we would apply the law.

The trial Court found that the transaction was had and consummated exactly as claimed by Defendants and we would insist that by reason of the fact that the trial court had the opportunity of hearing the examination of the witnesses and noting their demeanor, that his opin-

ion is entitled to great weight upon this appeal; and it also might not be amiss to suggest a fact which is probably within the knowledge of this Court, that the learned Judge was formerly a State Circuit Judge with Coos County as part of his circuit, and by reason of his knowledge of local conditions, acquainted with the parties and their credibility, he was peculiarly qualified to try this case.

THE EVIDENCE OF THE TRANSACTION

Defendant Henry Sengstacken gives in his own language the evidence of the manner in which the sale of the properties involved was entered into and consummated, and the same is as follows: "Q. Now relate in your manner, the circumstances and facts surrounding the initiation and consummation of this sale of the Norman tract to yourself and associates? A. Repeat that question please. (Question read.) I had, as I said before, the purchase in my mind for some time, on account of joining my Timberman tract, and I was told about this time, about the 17th of May, or just before that, that Mr. Buckman had made an offer for the tract; Mr. Buckman at that time lived at the East Side; that he had made an offer of \$3500 for the Norman tract, \$3500 cash, and I met Ren Smith in town one day. He and I had been do-

ing some business together before, and I suggested to him that we would go in together and take it in, perhaps he could take part of it. I am not sure if he agreed that day or not, but anyway very soon afterwards—he looked into it some—he agreed to go in with me, and we would take it. So he and I went up to Judge Hall's office, and ascertained what he would sell it for, on terms of half down and half on time. He said he would take \$4400, so we agreed to take in on the terms of half cash and half in one year, interest six per cent; and we at that time gave him our joint note, payable ten days after date for \$100, as part payment of the land. Q. Is Defendant's Exhibit BB that note? A. Yes sir, that is the note. Q. Did you make out that note? A. I made that note out. Q. And did you put the endorsement across the face here, 'Paid by purchase of land. Mrs. Dora Norman.'? A. I did that when it was redeemed, yes. Q. On August 30, 1905, did you make that endorsement? A. Yes, when I got the note back. I don't know the exact date. Q. Did you cut the signature off that date? A. I did. That is the way I generally cancel my notes; cut the name off. Q. Whose names were signed to that note before you cut them off? A. Henry Sengstacken and L. D. Smith. Q. Now, proceed with your testimony. A. When we paid him the

note, my recollection is that we took a receipt for \$100 on account, describing the land and the terms, and subsequent to that we proceeded to interest other people in the deal. I believe we had some little understanding as to who we would take in, that is, take in people that would be agreeable, and people that could afford to buy and pay for it. So we made up, I think, a little list of whom we would see. I think, amongst others, I saw Stephen Rogers, E. A. Anderson, Taylor Siglin, D. L. Rood; Taylor Siglin refused to go in. So did Mr. Anderson. But Mr. Rogers, after considering it, agreed to take a one-sixth interest, and D. L. Rood agreed to take a one-twelfth interest. I think that Mr. Smith arranged with Mr. Clinkenbeard for his interest, I think he did the talking to him. Shortly after this first transaction at Hall's office, that I speak of, Mr. John F. Hall went to the city, I believe. He was gone some four or six weeks, I don't know exactly as to the time, but about that time, and when he came back, I went to him with a view of closing the deal. I am not positive if he had secured the abstract at that time or not. I believe he had to order it from Mr. Hacker, who was then making abstracts, but I believe the abstract was held up waiting for a Sheriff's deed, which had not been recorded, and was not recorded until the 26th of Au-

gust, 1905,—24th of August, 1905. Then after that was recorded, the title was passed upon by my attorney, who was Mr. C. A. Sehlbrede, and the day for making final payment was then set for August 30, 1905. On the morning of August 30, 1905, when the Coos River boats came down, which arrived in Marshfield about ten o'clock, I saw—I should have stated there before, that among those I saw were Herbert Rogers, who also agreed to take a one-twelfth interest. And this morning of the 30th of August, 1905, when the boat arrived, on which Herbert Rogers was working, he informed me that he had changed his mind about taking his one-twelfth interest; that he didn't consider it an extra investment, or words to that effect. I believe that Mr. Stephen Rogers, his father, came down that morning, and so did Mr. J. J. Clinkenbeard, and I expected that morning that they would come to my office; that is, to make payment in there, but found out afterwards that they had gone direct to Mr. Hall's office and paid their money in to Mr. Hall. L. D. Smith paid the amount of his three-twelfths in to me. I think it was in checks on Flanagan & Bennett Bank, and D. L. Rood gave me his check for his one-twelfth interest, and I went up to Hall's office, and told Mr. Hall that all the men who had agreed to take an interest with us were here, but that Herbert

Rogers had backed out, and would not take his interest. I says to Hall: 'What's the matter with you taking his interest? You are getting a commission out of this for selling this land, and you might as well take this interest to close it up.' He replied that he didn't know, and would talk it over with Tom. And I paid in to Mr. Hall the amount of my three-twelfths, Mr. Rood's one-twelfth, and Mr. L. D. Smith's three-twelfths, and I believe the matter was left open until the next morning to decide whether or not Hall would take the interest. I believe that he remarked that if he didn't want to take the interest, that he would trust me for the other part due on the payment. The next morning I saw Hall again, and he said that he had talked it over with Tom, and that they had concluded they would take the interest. Q. Did the deeds pass at that time, and the mortgage? A. Yes, sir. Q. Now, what was done with the title to the property, and when was that agreed upon? A. It was agreed upon beforehand that the title should be put in the name of the Title Guarantee & Abstract Company, Trustee, in order to avoid the trouble in transferring—in case any of the parties in the venture should die, it wouldn't tie the property up, so we concluded it would be easier to handle it in that way by putting it in the Title Guarantee & Abstract Company, as

trustee for the parties interested. Q. Where is the receipt which was given you by John F. Hall on May 17, 1905? A. I don't know. I have been looking for it, but I have been unable to find it. Since that transaction, I have moved my office three times. The last time I moved from the Flanagan & Bennett Building; considerable of my old papers were in the back room and rained upon, and in moving into the new quarters where I now am, I destroyed considerable of my old records, which I thought were past age, and I had no further use for, and some without overhauling, and it is possible it may have been destroyed, and it is possible I may have it yet among my papers. At any rate, I haven't been able to locate it. Q. Have you made a careful search for it? A. I made quite a search. Q. Did you consider that receipt of any value after you got your deed? A. No, I didn't consider it of any value. I thought the proposition was closed. Q. What became of the title of the property in later years? A. We afterward platted a portion of it into lots, and I also platted a portion of my own property that I got from Timberman in the same plat, called East Side. The plat was produced here in evidence, and later we platted another forty, called the Home Addition to East Side in larger lots. We thought they might sell to the mill employes

over there, but they didn't go so very fast after all, and in selling some of these lots in the East Side, we run against objection the way the title stood, that is, this Trustee title business was not considered very satisfactory at the best, and to overcome that, and bring everything clear into the proper owners, we concluded that we would incorporate and have everybody who had ever had anything to do with the land, deed into this corporation incorporated in the name of the East Side Land Company. Q. And does that company hold the property at the present time? A. They hold the property now. Q. And among whom is the stock divided? A. I own 50 per cent, or one half—six-twelfths, and L. D. Smith five-twelfths, and Z. T. Siglin one-twelfth, or in other words, the stock—we incorporated for \$9600 at \$10 a share. Consequently L. D. Smith had 400 shares, Z. T. Siglin 80 shares and my proportion was 480 shares of it. I subscribed for 478 shares, I believe, my wife one share, and Mr. Street, at that time my secretary, one share, making the amount." (Trans. pp. 307-313.)

The evidence of Henry Sengstacken, above set forth, is corroborated by the testimony of John F. Hall, L. D. Smith, and each of the other parties interested in the original purchase of the land in controversy. There is no evidence to the

contrary. The only evidence which Appellant claims is to the contrary is the evidence of the letter of John F. Hall of May 19, 1905, wherein Defendant Hall in writing to Mrs. Herrmann says: "There is considerable talk about land, and we have a good prospect of selling the Holcomb tract for \$4000." (Trans., p. 221)

Appellant claims that this letter written on May 19th, shows that there was no sale made on May 17th.

But this letter is explained by Defendant Hall as follows: Q. I hand you defendant's Exhibit Y, your letter to Dora Herrmann, in which you said: 'there is now considerable talk about land and we have a good prospect of selling the Holcomb tract for \$4000,' and ask if you have any explanation to make of that statement in view of your testimony that the sale was actually made on May 17th? A. I had not received any money other than the note introduced here, and I didn't wish to lead her to think that the sale was completed until I got the money in my hands. She was very peculiar. You will notice by some other letters here, when I would write telling her I was negotiating with certain persons or thought I had a sale, and it fell through for any reason, she was always writing asking why I didn't complete it, and while I considered the sale was made, yet at the same time it

was subject to title and subject to examination, and I thought I would wait until I got the money before I said anything about having completed it.” (Trans., p. 245); and in cross examination: “Now why did you not write her that you had entered into a contract for sale of the land? A. Well, I don’t know, I did not think it was necessary. That is one reason and another reason was that if I wrote her, as I did, you will notice on two or three other occasions, telling her I was dealing with certain individuals on that property, and it fell through anyway, she would be writing back, the old lady would be worrying about it. She worried a great deal about it.” (Trans., p. 251.)

The trial court found that the sale was entered into, and consummated exactly as Appellees claim, as shown by his opinion, at pages 80 and 86 of the transcript herein.

The original equitable purchasers were Henry Sengstacken, L. D. Smith, S. C. Rogers, J. J. Clinkenbeard, D. L. Rood and Herbert Rogers. On the question as to whether these parties were bona fide purchasers in this transaction, the uncontradicted evidence of each will show as follows:

L. D. Smith testifies that he understood that Herbert Rogers was to take the one-twelfth interest, which ultimately was purchased by John

F. Hall and J. T. Hall, and that on August 30th he paid for his interest in the property without any notice that either of the Halls were to have any interest in the property. Examination of L. D. Smith: "Q. Well, my question was, how soon after that time did you learn that Hall & Hall, or John Hall had taken an interest in the property? A. The next time I came to town, Mr. Sengstacken told me. He says: 'By the way, Mr. Rogers fell down right at the last minute—Herbert Rogers.' He was the one that Mr. Sengstacken had solicited to go in, and he says, 'right at the last minute he fell down,' he says. 'And I got,' he says, 'Johnnie Hall or Hall & Hall, to take his interest.' Q. At that time you paid your money in, or at any time before that time, did you have any idea, or suspicion that John Hall, his brother, or Hall & Hall, was to take or acquire any interest in this property? A. Of course not. It was never talked of, although we all met, and I didn't think of anybody else. Rogers was to take that—Herbert Rogers was to take that interest, agreed to take it. Q. What was the amount of your interest? A. My interest? Q. How many twelfths? A. Three-twelfth. Q. Do you still retain that interest? A. Yes, sir. Q. Have you acquired any additional interest? A. Yes, sir. Q. In the property? A. Yes, sir. Q. Who from, and when?

A. I acquired the interest of J. J. Clinkenbeard.” (Trans., pp. 278-279.)

S. C. Rogers testifies “that at the time he paid his share of the money to John F. Hall he saw the deed; that Mr. Hall had the deed; that it was read to him at that time—that Defendant Clinkenbeard was present during this time, and that he encouraged Clinkenbeard in taking an interest; that the deed was read to him, and he paid his money; that he thought upon his payment of the money and acceptance of the deed that closed the bargain; that at the time he did not know that John F. Hall or Hall & Hall were to take an interest in the deed; that he did not have any suspicion that John F. Hall or Hall & Hall were to acquire any interest under the deed at that time, but that they were doing the work for another party, and were getting others to take stock.” (Trans., p. 337.) “Q. How long after did you find out Hall & Hall had acquired any interest in this property? A. Oh, I should think a month.” (Trans., p. 338.)

It is admitted that the Rogers interest was a two-twelfths interest, and was subsequently acquired by Defendant Sengstacken.

J. J. Clinkenbeard testifies: “Q. Now, when you finally paid your money in, state the circumstances surrounding the paying of your money for your share. A. The money was all

to become due on a certain day; I would not attempt to testify as to the day; the day the money was to become due Mr. S. C. Rogers and myself went into the office of Judge Hall, and we each made out a check for one-half of the amount that he was to pay for the land, and we called for the papers, deeds, etc., which we looked over, and after we had done so, we paid our proportion. I disremember the exact amount, but one-half of the purchase price of the land. Q. One-half of your part of the purchase price? A. Mr. Rogers paid his proportion at the same time; we paid this money to Judge Hall. Q. Did you see the deed to the property at that time? A. Yes, sir. Mr. Rogers and me looked it over. Q. Was it then signed and executed by Mr. Hall? A. We considered it properly signed; we were satisfied with it. Q. At that time, who were the other parties whom you understood were to take an interest in this purchase? A. There was Mr. Henry Sengstacken, and Mr. L. D. Smith, in fact, they were the ones that were soliciting subscribers for the funds to buy this property, and D. L. Rood, H. H. Rogers, and S. C. Rogers, and myself is all that I can call to mind at this moment. Q. At the time you made the purchase and paid your money in to John F. Hall, did you have any knowledge or notice that John F. Hall or Hall & Hall were to acquire any

interest in the Norman tract by virtue of that transaction? A. No, I didn't. Q. How long afterwards was it before you first discovered that John F. Hall or Hall & Hall had acquired any interest in the Norman tract? A. I could not say about that, it was some time afterward, I don't know, it might have been a month, and it might have been six months. I don't remember the time. Q. At the time you paid your money in, had you any suspicion or intimation that John F. Hall or Hall & Hall were to obtain any interest in the Norman tract by virtue of that sale? A. No, sir. I did not. Q. At that time, had any other persons than the persons you have mentioned, been suggested as purchasers under this deed, by either Mr. Sengstacken or Mr. Smith? A. Not that I remember. Q. How much later did you sell your interest? A. I don't remember, I suppose a year and a half, or such a matter after we bought the property. Q. To whom did you it sell it to? A. L. D. Smith." (Trans., pp. 356-7-8.)

D. L. Rood testifies as follows: "Q. Are you the D. L. Rood who, in 1905, was interested in the purchase of a tract of land known as the Norman tract from Christian Herrmann and Dora Herrmann, through John F. Hall, their attorney in fact? A. Herrmann, not known by that name; yes, I am. Q. State the circum-

stances under which you became interested in that purchase? A. Why, Mr. Sengstacken and Ren Smith were the ones that I understood purchased the property, and they come to me and wanted to know if I wanted to go in on the ground floor with them, and I told them that I would. Q. How much of an interest did you agree to take? A. One-twelfth. Q. Who were the other persons whom you understood at that time were interested in the purchase of this tract? A. Why, S. C. Rogers, and J. J. Clinkenbeard, and the young Rogers, Stephen's son, Herbert Rogers; I don't know as I remember all that was in it. Q. Did you understand that Mr. Sengstacken and Mr. Smith were retaining an interest also? A. Yes, sir. Q. Who did you pay your money in to? A. Why, if I remember correctly, I paid mine over to Henry Sengstacken; I would not want to swear to that but as near as my recollection is now, I paid it over to him. Q. Do you remember the date? A. If I could find some old checks; I think it was in August. If I remember I know I gave a check for it. I think it was in August, but I don't know; would not try to tell the date as far as that, but I think it was the month of August. Q. At the time you paid your money in on the interest that you were purchasing, did you have any notice or knowledge of any other persons

being interested in this purchase than the ones you have mentioned? A. Why they were all mentioned, but I have forgotten who they were; they were told to me, but really I have forgotten who they were. Q. Did you have any knowledge at the time you paid this money in that John F. Hall or the firm of Hall & Hall were interested in any way in this purchase? A. Not as purchasers; I understood Hall was the agent, or something like that, for it. Q. Did you have any suspicion or intimation that John F. Hall or Hall & Hall were going to acquire any interest in this property? A. No sir. Q. When was it that you first learned that Hall & Hall or John F. Hall had acquired any interest in the property. A. Why, I think they told me up in their office some time after that; I could not say how long. I think, if I remember, Tom, as we call him, said that they had an interest in it. Q. At the time of the sale, whom did you understand had agreed to take the interest which afterwards developed that Hall & Hall had taken? A. Young Rogers I understood backed out; that is, Herbert Rogers." (Trans., pp. 369, 370, 371.

Herbert Rogers testifies that he had agreed to take a one-twelfth interest in the property, but that on the day he was supposed to pay his money in, August 30, 1905, he told Mr. Seng-

stacken that he had decided to back out of the bargain. Trans., p. 348-9.

This interest of Herbert Rogers was the interest which was taken over by John F. Hall and J. T. Hall under the circumstances disclosed by the testimony of Henry Sengstacken above set forth. And in respect to the acquisition of the Rogers interest by John F. Hall and J. T. Hall, John F. Hall testifies as follows: Q. Now when did you first hear anything about any syndicate being formed by Mr. Sengstacken and Mr. Smith, as alleged in the answer in this case? A. Well, now, I don't remember the date, but I think it was in July. Q. What did you hear about that? What was the understanding in that regard? A. Well, I was talking to Mr. Sengstacken about it, and he said he was going to get some other parties in with him and was going to form a syndicate and take it together, and that—I think it was in July, and later on he told me that he had—it was all taken up—all the shares were taken up, and on the date, that is, the 30th of August, Mr. Rogers came in and paid me—. Q. Which Rogers? A. S. C. Rogers, we generally call him Stephen Rogers. He came into the office and paid me three hundred and sixty-six dollars and some cents, and at the same time, Mr. Clinkenbeard came in and paid a like amount, and later Mr.

Sengstacken came in and he said that one of the parties that was to take an interest in the property had gone back, and wanted me to take an interest in it. Q. Did he say who that was?

A. Well, I am not sure now. My brother was there; he says he said it was Herbert Rogers, but I have no recollection whether it was Herbert Rogers or not, but he said one party went back, and he wanted me to take an interest in it.

Q. Did Mr. Sengstacken pay any money in at that time? A. He did, he gave me a check.

Q. How much did he pay at that time? Will you refer to your books of that date? A. Clink-

enbeard paid \$366.65; Rogers \$366.65; Sengstacken the total amount he paid was \$1466.70.

He didn't give me all that money, but that is what we gave him credit for, and the check was for some five hundred and some odd dollars, and I had him to make up the rest the next day.

Q. Did he have some money for Smith—did he pay money for Smith and Rood? A. He paid for others, I don't know who the other parties were. In my book I made it 'others'. I didn't know who the other parties were at the time.

Q. And that was the reason you credited it in your book as 'others'? A. Yes sir. Q. Be-

cause you didn't know the other parties? A. I didn't know who they were. Mr. Sengstacken had told me probably two or three days before,

I don't know just how many, that the parties buying the property—that the title was to be made to the Title Guaranty & Abstract Company and I didn't know who the other parties were that were purchasing, other than Mr. Smith; that is, I didn't know Mr. Rogers was in it until he came in to make a payment. Q. I will ask you to examine Plaintiff's Exhibit 16, and state if that is a correct copy of the book item which you made and entered as of that month, at the time of the transaction?. A. Yes sir, that is a copy of the book—copied right from the book. Q. What did you tell Mr. Sengstacken when he suggested that you take this Rogers interest? A. I told him that I did not think I could do it. My brother was interested in it or in the fee. Mr. Sengstacken figured that our commission would come out of it, and it wouldn't cost us anything. I said I couldn't agree to do that until I consulted Tom, because I didn't know whether he would stand it or not. He had been hurrying me up, in fact had objected to my sending the rent, when she was owing us for the foreclosure suit, and I told him I would let him know the next morning. I thought probably I would do it. The next morning he came in and I told him—I talked it over with Tom the night before—and I told him we would take this share. Q. When with refer-

ence to this conversation with Mr. Sengstacken, did you execute the deed? Well, the deed was delivered on the 30th. I don't know whether we wrote it on that day, or whether we wrote it before. The deed would show the date, but I think the deed was executed on the 30th. Q. Do you remember whether or not it was executed at the time Rogers and Clinkenbeard paid their money in? A. The deed had been executed at that time, yes. Q. Do you remember reading it to Clinkenbeard and Rogers? Or anything of that kind? Do you remember if they examined it? A. No, they didn't examine it, they just asked if it was made out. Q. Now did you take this interest in this property? A. Took an interest, yes. Q. Why? A. Well, after talking it over with Sengstacken that night, and with my brother the next day, why, we didn't want to hang the matter up. Of course if they didn't pay the money then, we would have to commence a suit to enforce it, and we didn't have to pay out any money; in fact there was a little coming to us after paying the interest we would take, and I told my brother we would take it." Trans., p. 235-6-7-8. And on cross examination John F. Hall further testifies: "Q. Now, you say that the reason you took this one-twelfth interest at that time was to keep the deal from falling through? A.

No. I don't say that. I said that it probably would delay matters. Q. Delay matters? A. Yes. Q. Well, what was it that Sengstacken told you about the deal falling through? A. He said one of his men went back on the deal, or went back on him or words to that effect. Q. But you didn't seriously consider the deal would fall through on account of a lack of \$183? A. Didn't think it would fall through, but thought it might delay matters, and the old lady was wanting money, and I was trying to hurry the money there to her." Trans. 265-6-7.

The evidence shows without contradiction that the original interests in said property are now held as follows: Defendant Sengstacken holds his own original interest of three-twelfths, together with the two-twelfths interest of S. C. Rogers, together with the one-twelfth interest of Herbert Rogers, which was taken over by John F. Hall and J. T. Hall, each having a one-twenty-fourth interest—making in all a one-half interest; defendant L. D. Smith holds his original three-twelfths interest, together with the two-twelfths interest of J. J. Clinkenbeard; Defendant Z. T. Siglin holds the one-twelfth interest of D. L. Rood, which Rood sold to Sengstacken and which Sengstacken sold to Siglin; that these parties—Sengstacken Smith and Siglin—incorporated the East Side Land Company,

as a holding corporation to hold title to the properties involved in this litigation, and divided the stock among themselves upon the basis of their equitable ownership in the lands.

This venture of defendant Sengstacken and his associates turned out to be a very profitable one, and in the year following the purchase railroad construction work was started towards Coos Bay, Oregon, and as a result this property, together with all other property around Coos Bay increased in valuation by leaps and bounds.

The appellant testifies that he came to Marshfield in April, 1909, and the defendant Hall then treated him fairly, turned over his papers to him, and secured a German interpreter to explain any matters of which Mr. Hermann might desire an explanation. Shortly thereafter the appellant negotiated the note representing the balance due from defendants in the purchase of a ranch near Marshfield, and for which note he received a credit of its face value with interest.

For two years Mr. Hermann lived in the vicinity of this land in controversy and made no objection to the manner in which defendant Hall had executed his agency in reference thereto. But in 1911, for some unexplained reason, appellant demanded an accounting. The whole long and short of the matter is that Mr. Her-

mann had been disposing of his deceased wife's property and living on the proceeds thereof, and in 1911 he came to the point of dismal outlook, where it seemed that he might actually have to labor for a living, which was an unpleasant thought to his aristocratic German soul. And as he saw these defendants selling his wife's property as a townsite, which was purchased by these defendants on an acreage basis, he became embittered and sought some method to recover the same.

And now years after the sale of said property, which was made by defendant Hall in the best interests of his principals, this court of equity is asked to set aside said sale, not only as to the one-twenty-fourth interest therein taken over by said agent, Hall, but also as to the interest of other purchasers who were innocent purchasers for value with no suspicion that defendant Hall was in any way interested in their property.

POINTS AND AUTHORITIES.

I.

As to Purchase of Interest by Agent Hall.

When an honest, bona fide sale between an agent and a third party has been so far executed that the same is enforceable against the principal, the duty of the agent with reference to the making of the sale has terminated in every mat-

erial sense and thereafter the agent may properly become interested in the purchase by contract with the third party.

Robertson vs. Chapman, 152 U. S. 673,
Walker vs. Derby, 5 Biss. 134,
McGar vs. Adams, 65 Ala. 106,
Moore vs. Green, 3 B. Mon. (Ky) 407,
Smith vs. Tyler, 57 Mo. App. 668,
Bookwalter vs. Lansing, 23 Neb. 291, 36
N. W. 549.

Walker v. Carrington, 74 Ill. 446.
Rathe v. Tyler (Ia.) 111 N. W. 436,
Halperin v. Callender, 39 N. Y. S. 1044,
La Force v. Wash. Univ. 106 Mo. App.
517,

Beauchamp v. Higgins, 20 Mo. App. 514,
Morgan v. Aldrich (Mo.) 91 S. W. 1027.

Oregon has adopted the rule of conflict of interest. If it appears that the agent purchased when there was no conflict of interest between his own interest and that of his principal, then the sale should be upheld.

Marquam v. Ross, 47 Ore. 405.

II.

As to Statute of Frauds.

1. "Whatever form the agreement may assume, if the writing or writings, received as a whole, constitute in essence and substance upon their face a note or memorandum in writing,

subscribed by the party to be charged, showing who the contracting parties are, the subject matter of the sale and the consideration, the statute is satisfied." (citing cases.)

Flegel vs. Dowling 54 Ore. 49.

2. "For this purpose we think the testimony of Maguire is admissible to show the circumstances under which the two instruments were executed, and how the parties acted with reference to them after they were executed, and what they did with them, and it remains to be determined what is the effect of them when considered together. Several writings may be taken together to make a memoranda of a contract sufficient to satisfy the statute. (citing) Salmon Falls Mfg. Co. vs. Goddard, U. S. 446 et al."

Flegel vs. Dowling 54 Ore. 49.

3. A receipt is a written admission.

Thompson vs. Layman 42 N. W. 1061
(Minn.)

4. "The phrase 'terms of sale' means all the essential ingredients of the contract or transaction."

Platter vs. County of Elkhart (Ind.) 2
N. E. 555.

5. But when a contract is proved by oral testimony, the statute of frauds must be raised by objection or motion to strike, and if not so raised the defense is waived and cannot be raised

upon appeal.

Pike vs. Pike (V T) 38 Atl. 265,

Nunez vs. Morgan, 77 Cal. 427,

Marr vs. Burlington, 121 Iowa 117, 96
N. W. 716,

Royal Remedy etc. Co. vs. Gregory Grocery Co. 90 Mo. App. 53,

Eisley vs. Malchow, 9 Neb. 174, 2 N. W.
372,

Roe vs. Bridges, (Tex.) 31 S. W. 317.

6. "The question of the sufficiency of evidence must be raised by objection in the court below, and will not be considered if raised for the first time on appeal."

2 Cyc. 698, Note 48, Citing cases from many jurisdictions.

7. "If there is a failure to make all the proof which is required, it seems that the defect should be pointed out in the trial Court so that it may be supplied, an objection coming too late if first made in the appellate Court."

2 Cyc. 700, note 50.

III.

As to Proof of Receipt.

1. Proof of the loss of the receipt was addressed to discretion of trial Court.

Elliott on Evidence Vol. 2 Sec. 1456 with note citing cases from many jurisdictions.

2. If no objection as to competency of witness to testify is made at time of trial, the objection will be deemed to have been waived.

Elliott on Evidence Vol 2. Sec. 721 with note citing cases.

3. "Whether the evidence of the loss or destruction of a paper is sufficient to let in secondary evidence of its contents is a question addressed to the discretionary power of the presiding judge, and, in the absence of an apparent abuse of his authority, his decision is not revisable by this Court."

Camden vs. Belgrade (Me.) 3 Atl. 652.

4. "If we were in doubt as to the existence of this alleged contract, the finding of the court below should prevail. When the court below has considered conflicting evidence, and made its finding and decree thereon, it must be taken to be presumptively correct. Warren v. Burt, 12 U. S. App. 591,600, 7 C. C. A. 105, 110, and 58 Fed. 101,106; Paxson v. Brown, 27 U. S. App. 49, 10 C. C. A. 135,144, and 61 Fed. 874,-883; Stuart v. Hayden, 18 C. C. A. 618,72 Fed. 402, 408; Fitchett v. Blows, 74 Fed. 47; Kimberly v. Arms, 129 U. S. 512, 9 Sup. Ct. 335; Evans v. Bank, 141 U. S. 107, 11 Sup. Ct. 885; Furrer v. Ferris, 145 U. S. 132, 134, 12 Sup. Ct. 821."

McKinley vs. Williams, 74 Fed. 102.

5. It is sufficient if the substance of the lost receipt be proved.

2 Elliott on Evidence, Sec. 1476.

BRIEF OF ARGUMENT

The Appellant in this case seems to found his position upon the following proposition:

That Sengstacken and Smith could not transfer any interest in the lands in controversy to defendant Hall until the legal title to the lands had passed from appellant and his wife, and that if they did so, the whole transaction was thereby tainted with constructive fraud, and that this appellant is entitled to set the sale aside and recover the property upon a tender of the purchase price together with interest.

On the other hand, the appellees contend that if a sale had been so far consummated between Sengstacken and Smith and defendant Hall, as the agent of appellant and his wife, that the same could be enforced by Sengstacken and Smith, then, that, for the purpose of this case, the agency of Hall had terminated, and Sengstacken and Smith could thereafter properly sell any part of the lands involved herein to defendant John F. Hall.

The appellees would support their position by the case of Wing and Evans vs. Hartupee, 122 Fed. page 900, which is a case decided in 1903 by the United States Circuit Court of Appeals

of the Third Circuit. In that case Crouse and Hartupée were co-trustees of 200,000 shares of capital stock. Crouse made a bona fide sale of said stock to a third party by the name of Pitcarn. Pitcarn was unable to take over all of the stock at once by reason of the fact that the same was pledged as security for an obligation, and he could only receive the same as it might be released therefrom. After he had taken over some of the stock, he sold, by a bona fide sale, 50,000 shares of said stock to Hartupée, the co-trustee, and in the suit to set aside the last mentioned sale the Court held that until the legal title of the stock passed to Pitcarn he would be unable to make a valid sale to the trustee. The Court, in its opinion, admits that this is an extension of the ordinary rule and that it is an arbitrary rule which might not reach the equity of all cases. And furthermore in this contract the Court does not specifically find an enforceable contract.

On the other hand the appellees rely upon the case of *Robertson vs. Chapman*, 152 U. S. 673, decided in 1894. In this case a man by the name of Polk was agent of the plaintiff in the negotiations of the sale of certain property to a man by the name of O'Donohoe. O'Donohoe was unable to complete the payments under his contract of purchase and before the deed was delivered to O'Donohoe, and while the same was

in the hands of Polk to be delivered upon the payment of the balance of the purchase price of said land, Polk took over the O'Donohoe contract and completed title in himself. Robertson, the principal, thereafter attempted to set aside the transaction on the theory that Polk could not properly take title to the premises under the conditions before mentioned, and the Supreme Court, in passing on that question, says:

“So that at the time Polk took the property from O'Donohoe, it was not in the power either of the plaintiff or of O'Donohoe to rescind the contract between themselves, and Polk's agency for the sale of the property had, in every material sense, terminated. Nothing then stood in the way either of O'Donohoe's agreeing that Polk should take the property, or of Polk's becoming a purchaser from him. If the sale to O'Donohoe was an actual sale, in good faith, so far as Polk had any agency in effecting it—if the contract between the plaintiff and O'Donohoe had been so far executed at the time Polk took O'Donohoe's place in the purchase, that it could not be rescinded by either party to it—then Polk's agency in selling the property did not prevent him from purchasing from O'Donohoe. And his failure to give notice of his purchase im-

mediately upon its being made cannot be regarded as a fraud upon the rights of the plaintiff. A real bona fide sale of the property, through the agency of Polk, and upon the terms prescribed by the plaintiff, and which sale was substantially completed between vendor and vendee, intervened between Polk's acceptance of the position of agent and his purchase of the property from the plaintiff's vendee. Upon this ground, the decree below can be sustained, without impairing, in any degree, the rule that an agent will not be permitted to become the purchaser, without the knowledge or consent of his principal, of property committed to him for sale."

The last above mentioned case has never been criticised or over-ruled and stands today as the law on the subject. The Hartupée case, relied upon by appellant, does not cite or discuss the Robertson vs. Chapman case. Evidently it was not called to the attention of the Court. If the Supreme Court of the United States had wished to extend the rule as did the Circuit Court of Appeals in the Hartupée case, there was much more reason for doing so in the facts of the Robertson vs. Chapman case.

So the rule as laid down by the United States Supreme Court, in cases of this kind, is, that if

the sale has been so far consummated that it may be enforced by the third party against the agent and principal, then the agent has a right thereafter to, in a bona fide sale, acquire a valid interest in the subject matter of the sale from the vendee.

The question then remains, do the facts in this case bring us within that rule? We claim they do. The appellant claims that we are not within the rule for the reason that the sale by Hall to Sengstacken and Smith was not consummated so that it could be enforced by Sengstacken and Smith prior to the time of the taking of the interest by defendant Hall.

The evidence in this case shows, and the trial Court so found, that defendant Hall as agent for appellant and his wife, on May 17th, 1905, sold the property involved to defendants Sengstacken and Smith; that at that time Sengstacken and Smith gave him their joint note for one hundred dollars as part payment on the purchase price, which note is introduced in evidence as "Defendant's Exhibit BB," and that Hall then gave Sengstacken and Smith a receipt for said one hundred dollars specifying the terms of the sale and describing the property. The passing of this receipt and the note was a sufficient memoranda to satisfy the statute of frauds of the state of Oregon, which said statute is correctly

set out on page 59 of appellant's brief. Under the authority of *Flegel vs. Dowling*, 54th Or. 40, these two instruments may be construed together as a memoranda of sale. The note shows definitely who the contracting parties are, being payable to John F. Hall, and being signed by Henry Sengstacken and L. D. Smith. The receipt, as testified to by Mr. Sengstacken, contained the "terms" and described the property. Mr. Sengstacken states the terms were \$4400.00, one-half cash and one-half in one year (T. p. 307.) Then (T. p. 308) he further testifies "That we paid him the note. My recollection is that we took a receipt for \$100.00 on account, describing the land and the terms." Defendant Hall testifies (T. p. 231):

Q. Was there any written memorandum made at the time signed by yourself in the nature of a contract or receipt or otherwise, with reference to this transaction?

A. I made out a receipt for \$100.00 on the purchase price of this particular tract of land.

It will be noted that this evidence of the receipt, both on the part of Sengstacken and Hall, was not objected to at the time of the trial nor was there any motion thereafter interposed to strike the same out, and now, for the first time, on appeal an objection is made that this is incompetent and insufficient to establish the con-

tents of said receipt. Under the authorities hereinbefore cited, the appellant cannot raise this question for the first time upon appeal and unless he objected at the time of the introduction of this testimony or moved to strike the same out, the insufficiency and incompetency thereof has been waived. And there is good reason in this rule, for it should not lie in the mouth of appellant, after having permitted the contents of this receipt to be proved in the manner above stated without objection, to now raise the question when it is impossible for the appellees to correct the proof. Had any suggestion been made at the time of the introduction of this testimony, as to its insufficiency, the witness could have been further interrogated and the contents of the receipt could have been more fully and definitely established. Or the appellant had the right of cross-examination, and before he could raise this question upon appeal for the first time he should at least be held to an attempt at correcting the objectionable features by cross-examination. In the heat of the trial many things are omitted which might more fully explain or identify, but when either party neglects to object to the insufficiency of the evidence offered, by objection or motion to strike, he is estopped thereafter to challenge such insufficiency for the first time upon appeal.

Appellant claims that there is no testimony which shows that John Hall signed this receipt; however, he does testify that he "made out a receipt for \$100.00 on the purchase price of this particular tract of land." Under the authorities cited a receipt is defined as a written admission of the party making the same. Defendant Hall could not make a receipt without signing the same, or until the same was signed it would not be a receipt. Then, too, defendant Sengstacken testifies that "We (referring to himself and Defendant Smith) took from Hall a receipt." This testimony, in the absence of objection, can only be construed to mean an executed receipt.

Mr. Sengstacken testifies as to the terms of the sale and then states the terms were included within this receipt, which, in the absence of objection, is sufficient declaration of the contents of said receipt in that regard. Both Mr. Sengstacken and Defendant Hall state that said receipt particularly described the property. So considering the note, together with the receipt, we have all the elements of a sufficient memorandum under the Oregon statute, as construed by the Oregon courts, namely, the signature of the party to be charged, the names of the purchasers, terms of the sale which includes the consideration, and the description of the property. In this case we should not be held to the same de-

gree of proof as would be necessary in a suit of specific performance based upon said memoranda. We could only be expected to prove such memoranda in general terms, for it would be impossible at this late date to prove the exact terms of a receipt written nine years ago, and which has been lost or destroyed, and which, at all times since the execution of said deed, has been of no value or importance.

But if the Court should find no memorandum sufficient to satisfy the statute of frauds, still we insist that Defendant Hall acquired a valid interest by taking over the interest of Herbert Rogers under a verbal contract of sale from Defendant Hall to Sengstacken and Smith. For the Court is bound to find under the evidence, as did the trial Court, that an honest, bona fide contract of sale was made by Agent Hall, without any suspicion or thought that he might ever acquire any interest in the property, and that he took over his undivided one-twenty-fourth interest in furtherance, as he believed, of the best interest of his principal. Hall did not consider that he was buying the interest from himself, but considered that he and his brother were taking over the Herbert Rogers' agreement with Sengstacken and Smith. His dealings were characterized by the highest good faith. *Under the circumstances, the statute of frauds should*

not be used as an instrument of fraud. And this Court of equity should not permit this Appellant to unjustly and inequitably raise the statute to assist this Appellant in unconscionably recovering this property which was innocently purchased by these defendants nine years ago.

The question involved is one of conflict of interest; did Hall, in fixing the price and making the sale, consult his own interests? If he did, the sale as to him is voidable; if he did not, then the contract should stand and the Appellants should not in this suit be permitted to raise the question whether the contract was a verbal or a written one; the defense of the statute of frauds is never available in a collateral proceeding, but only in a proceeding brought directly upon a contract; this contract was completed by deed and upon the issuance of the deed, the query of whether or not the contract of sale was in writing was immaterial, and any attack thereafter upon said contract must necessarily be a collateral attack.

To permit Appellant at this time to raise the defense of the statute of frauds was never contemplated by the principles of the law of agency or by the statute itself; it is a defense foreign to the issue; the question is, not as to the form of the contract, but was the contract made by

Hall with an eye single to the interests of his principal; if so he could thereafter acquire an interest in the transaction, and if not—if Hall had any idea of self-interest when he made the contract—then the sale is voidable as to any interest thereafter acquired by him in connection with the transaction. But at this time to permit the Appellant to defeat the well-recognized principles of agency by raising statute of frauds, would make the statute an instrument of fraud, which a Court of equity should never sanction.

And also the Appellant contends that Sengstacken was not qualified to testify with reference to the contents of such receipt by reason of an insufficient search for the original. Hall stated that he gave the receipt to Sengstacken and that it was never returned to him. Sengstacken stated that he made search for the same but had been unable to locate it. Appellant states that the qualifications of Sengstacken in regard to the degree of his search was insufficient and that he was incompetent to give any testimony as to the contents there. But again Appellant is late to raise his objection. Under the authorities heretofore cited, it will be seen that the qualification of the witness in this regard is trusted to the sound discretion of the Court in view of all the circumstances, the importance of the instrument, the length of time

intervening since the execution thereof, etc. The trial Court in this case found that the witness was qualified, because in his findings he finds that the receipt was given as claimed by Hall and Sengstacken, and this decision would not be disturbed by this Court unless it could say that there had been an abuse of such discretion. But by not objecting at the time, the Appellant waived his objection and cannot now be heard to raise the same for the first time upon appeal. And the reason of the rule is the same as before, for had we been advised that Appellant had any objection to the qualification of the witness we could have further interrogated the witness and made his testimony more definite and certain.

But more than all this, the Appellant permitted us to prove the sale to Sengstacken and Smith by oral testimony, without objection. He did not plead the statute of frauds as a defense to said sale, and so, if he would take advantage of the statute, he must object, at the time of trial, to the proof of the sale by oral testimony, and if the sale is proved by oral testimony to the satisfaction of the Court, without objection from Appellant, then the Court must find that a sale was made. This is the rule adopted by the Courts in proving contracts which might be within the statute of frauds, and we can cer-

tainly be held to no greater degree of proof in this case than we would be in case we were suing upon the contract in question. But in addition to the note and the receipt the Defendant Hall, on August 30, 1905, as attorney in fact for the Appellant and his wife, executed a deed in consummation of said sale, setting out the purchase price, the description of the land, the consideration and named the Title Guarantee & Abstract Company as Trustee. Under the authority of *Flegel vs. Dowling* above cited, oral testimony is before the Court connecting the note, the receipt and the deed, and any deficiencies in one may be explained from the other, for as shown by parol these instruments are all connected with the same transaction and the same negotiations. And upon this deed John Hall accepted eleven-twelfths of the consideration before it was suggested to him that he take the one-twentyfourth interest in the property. The grantee in the deed was the Title Guarantee & Abstract Company, Trustee, and it has always been competent to show by parol the beneficiaries under a grantee of this character.

So the first question for the Court to decide in this case is, was the sale so far consummated at the time Hall took his interest that it could have been enforced against his principals? His authority to make the sale is unquestioned, and

his power of attorney is here in evidence. And not only the note, the receipt and the deed with part payment thereon, but also we have the letter signed by John Hall, of date August 12th, 1905, in which he states: "The Holcomb claim, I guess is sold. Parties agreed to take the same and the abstract is now being made and unless the parties go back on the bargain, we will be able to close the deal about the 1st of September." And this, by oral testimony, is shown to refer to one and the same deal or transaction. If this sale, on August 30th, 1905, could have been enforced against the Appellant and his wife, then we are squarely within the rule laid down in the case of Robertson vs. Chapman; in which case there would be no other or further question for this Court to consider. That there was such a sale is found by the trial Court: (T., p. 80.) "Here the sale was virtually made by Hall to Sengstacken and Smith in May, 1905. At that time it is admitted he had no interest either immediate or prospective in the property and no idea that he would ever acquire one. His duty to his principal ceased at the time of the contract with Sengstacken and Smith, as far as the fact of the sale was concerned. Thereafter there was no conflict between his duty to his principal and self interest in that regard. His subsequent taking title to an undivided one-

twenty-fourth was, to all intents and purposes, a purchase from Sengstacken and Smith or Herbert Rogers, and not from himself as agent of Mrs. Herrmann. The fact that the deed had not been formally acknowledged and delivered at the time cannot change the effect of the transaction, or, in my judgment, bring it within the rule prohibiting an agent from buying from himself, nor the evil to be prevented thereby."

This Court is bound by the facts as above found by the trial Court and it will be noted that the title to the property at the time of the taking of the interest by Hall was in exactly the same condition as was the title in the Robertson vs. Chapman case. In the last mentioned case the legal title had not been passed to O'Donohoe, the deed therefor was in the hands of the agent awaiting the completion of payments by O'Donohoe. So in this case, the deed had been signed and executed by Hall under his power of attorney from his principals, and was being held by him awaiting the payment of the balance of the purchase price.

From every viewpoint we are squarely within the Robertson vs. Chapman case and entitled to the application of the law in that case. Inasmuch as we regard the law of the case well settled we have set out the evidence of this case, in the statement of the case, and particularly

called the Court's attention thereto, for we believe that this case will turn upon the consideration of the evidence rather than a consideration of the law, for we believe that the law is well settled.

OREGON RULE.

While we rely upon the rule as laid down by the United States Supreme Court in the above-mentioned case, the Supreme Court of the State of Oregon has laid down a less stringent rule. In the case of *Marquam vs. Ross*, 47th Oregon, 404-405, the Court has laid down this proposition: if the purchase was made by the agent or trustee at a time when there was no conflict of interest between the agent or trustee and the principal or beneficiary, then the sale or purchase should be upheld, and the Court says, after citing many cases pro and con:

“But it is unnecessary at this time for us to examine the adjudged cases, or attempt to deduce any general rule from them, if, indeed, it is possible to do so. It will probably be found on investigation that the decision in each case depends upon the application of the general rule of disqualification to the particular facts, and that, where there was a conflict between duty and self-interest, the purchase was held void-

able, regardless of the manner in which or by whom the sale was made, and where there was no such conflict, it was upheld.

The decision of the case in hand depends upon the construction of the contract between the plaintiff and the Title Company, and the relation which the parties sustained to each other by reason thereof. When we have arrived at this determination, the way is clear. If it was such that there was a conflict between duty to the plaintiff and self interest of the Title Company at the time the sale under the foreclosure decree, the plaintiff must prevail; otherwise, his suit fails on this branch of the case."

And we are squarely within the rule as laid down by the Oregon Court, for at the time John Hall took his undivided one-twenty-fourth interest he had sold the property to Sengstacken and Smith and had charged himself in his account with these principals to the extent of the one-half payments, telling Sengstacken that he would hold him for the balance in case he should decide not to take it. And Hall's testimony shows that he finally took the interest in order to close the matter up promptly, without delay, and not with the idea of gaining any profit out of the matter. His testimony conclusively shows that he believed he was act-

ing conscientiously and to the best interest of his principal, when he took over from Sengstacken and Smith the one-twenty-fourth interest; that he considered that he was buying his interest from Sengstacken and Smith is conclusively shown by the fact that he credited the entire payment and charged Sengstacken with it before he decided to take any interest.

Effect of Transaction on Interests of Smith,
Sengstacken, Rogers, Clinkenbeard, Rood
and J. T. Hall.

If the Court sustains our contention that Hall properly secured his interest in the property, then it will not be necessary to consider this phase of the case. But if the Court should conclude that the sale of the one-twenty-fourth interest to John F. Hall should be set aside, then the Appellant should recover that interest, for Sengstacken has acquired this interest of Hall with knowledge of all the facts now before the Court.

The Appellant contends that the sale should be set aside as to all the original purchasers on the theory that they were co-purchasers with Hall and that his constructive fraud tainted the whole transaction.

For the purpose of argument we will admit

that if Hall had agreed from the beginning of the negotiations to take a *joint* interest with the other purchasers and they had knowledge of that fact, then and in that event, the sale could be set aside in its entirety. That is the rule of law laid down in the cases cited by Appellant and is a most salutary principle.

But the facts of this case differ from the facts of every other case cited by Appellant. These defendants were not co-purchasers from the beginning of the negotiations, nor were they *joint* purchasers at any stage of the transaction. When Rogers, Clinkenbeard, Rood and Smtih agreed to take their respective interests and paid their purchase prices respectively, there was no suggestion, suspicion or intimation that Hall was a purchaser with them. Appellant recognizes this fact and seeks to avoid the effect of the same by saying that Sengstacken was their agent and that notice to him was notice to them. But this would be true only if Sengstacken gained this information while acting within the scope of his agency. What was the nature of the relation of Sengstacken to these parties, was he their agent in buying their respective interests in the property? If so, then notice to him would be notice to them on this point. But such is not the case. Each had bought and paid for his interest and whatever notice came to

Sengstacken, came to him after their respective deals were closed, after they had paid their money and returned to their homes. Their status as innocent purchasers was fixed when they completed their purchase and any information gained after they had once become innocent purchasers could not affect that status.

Not only was Sengstacken not their agent in making their purchases, but on the contrary, he was opposed to them in interest; he was selling *to them*, not buying *for them*.

Nor was Sengstacken nor Hall a partner with these parties for they were not buying the property jointly or as an association. Each was buying a several interest which thereafter he sold and transferred without reference to the others.

So long as the profits to be realized were not mutual, there is no reason for the rule that the setting aside of the Hall interest should also cause the setting aside of the other interests. They were at most co-tenants of an equitable interest. Sengstacken sold the one-twelfth interest of Herbert Rogers to Agent Hall and his brother, J. T. Hall, each to hold an undivided one-twenty-fourth interest. Suppose that Clinkenbeard had sold *his* interest to Hall without the knowledge of the other parties, would Appellant contend that by reason thereof the title of the other purchasers would have been inval-

idated? Certainly not! The Court should remember that the interest of each was a several one to be disposed of as the owner saw fit without reference to the others, and that in any event, there was no actual fraud in the case.

In the absence of actual fraud constructive fraud could only extend where there was notice *and where the ownership was joint*.

Suppose that the principal had owned a block of twelve lots and had authorized the agent to sell the whole block and the agent had honestly sold all of the lots in this block to several purchasers, except the last one, and without notice to the others, the agent had purchased this last lot, would appellant contend that the purchase by the agent of this last lot would avoid the other sales?

And taking the supposition farther, suppose that each of the other purchasers knew after purchase, that the agent was buying the last lot, would that affect their purchase? Most certainly not; for the purchasers became innocent purchasers at the time of their purchase.

Or assuming still further, suppose that the purchasers knew from the beginning that the agent was to buy one lot, then so long as the purchase of each was made in good faith he would be protected therein; and the distinction is that the purchasers were several purchasers—they

were not co-purchasers within the meaning of the decisions cited by appellant.

Either these several interests were purchased from Sengstacken and Smith, if their contract was enforceable, or, if not, then these several interests were purchased from the principal through the agency of Hall.

If the former proposition is true then no part of the property can be recovered and we are entitled to judgment.

Or if the latter proposition be true and the purchase of each was from the principal through the agent, then the sale should be set aside as to the one-twenty-fourth interest acquired by Hall. But as to Clinkenbeard, Rogers, Smith and Rood the sale should be upheld, for these parties purchased without any notice whatever as to the acquisition by Hall of his interest. As to the Sengstacken interest it was acquired and paid for before Hall decided to take any interest and we claim for him the benefit of an innocent purchaser. This leaves only the one-twenty-fourth interest of J. T. Hall which was acquired by him with knowledge that agent Hall was likewise acquiring a similar interest; and as to the interest of J. T. Hall we claim that the sale should not be set aside for the reason that the same was not a *joint* purchase with agent Hall, but he was a several own-

er and that the rule of constructive fraud only extends to a joint purchaser with the agent. Of course, if there was any connivance, conspiracy or fraud, the rule would be different, but in the absence of such fraud we contend that any person may make a several purchase from the principal through the agent so long as he does not join with the agent in a joint transaction, even though he may have notice of a similar purchase by the agent.

The fact that this transaction was made under one deed and the that these parties were sold equitable interests instead of legal titles, cannot change the reason of the rule. Equity will regard the substance rather than the form of the transaction. And so long as the agent acted in the interest of his principal we claim he could sell an undivided equitable interest to Tom, Dick or Harry, and the fact that he may have taken an interest himself will not invalidate the sale as to them so long as the interests are several and the profits therefrom are not necessarily mutual. The rule preventing such a sale is a rule of agency law and has no application between the principal and third parties who are not *joint* purchasers with the agent.

Another equitable principle should here be applied. Each of the purchasers, as the evidence shows, was acting entirely in good faith; the

conscience of each was clear; no suspicion of unfairness lurked in his mind; why should any of said purchasers presume or suspect that Hall was concealing or intended to conceal his purchase? Equity would seem to demand that if any person should bear the damage of Hall's agency, it should be his principal, and not an unsuspecting public. The principal had appointed Hall as her agent and held him out to the world as such; he sold her land to these defendants who purchased the same in absolutely the best of faith; now if he was false to his trust, in failing to report to his principal the fact of his purchase, who should now suffer—the innocent purchasers who had no reason to even suspicion said Hall but believed him to be acting in the best of faith, or should the principal under such facts and circumstances be the sufferer? We contend that under the facts of this case the defendants Sengstacken, Smith, Rogers, Clinkenbeard and Rood are innocent purchasers; why should said defendants, when without suspicion, be called to investigate the relations existing between Hall and his principal? There was no reason why said defendant should suspect that Hall was not reporting the facts of his purchase to his principal, and if anyone should now suffer, it should not be the innocent parties.

It remains to consider the status of the interest of the defendant Z. T. Ziglin. It is undisputed that Ziglin acquired the interest of defendant D. L. Rood. D. L. Rood was an innocent purchaser and the sale to him of the undivided one-twelfth interest should be upheld. Rood then transferred to Sengstacken and Sengstacken in turn transferred to Siglin. The title of this interest was validly conveyed by the appellant and his wife to defendant Rood and any acquisition thereafter by Sengstacken, Siglin or any other person cannot change the status of the title. Even if the Court should hold that the original interest of Sengstacken should be recovered, still there is no rule of law which would require Sengstacken to give up the title to some other property which had been validly sold by the appellant and his wife to some third party and by Sengstacken purchased. Assuming, for the purpose of the argument, that the purchase by Sengstacken of his three-twelfths interest was fraudulent, still that fact would not affect the title of other property which he might purchase where the title had passed in the first instance from appellant and his wife without fraud. But the fact is, so far as defendant Siglin is concerned, that he purchased the Rood interest from Sengstacken in 1909 without any notice or knowledge whatever of the conditions

surrounding the original purchase, and by every token is an innocent purchaser of said interest (T. p. 352.) A misprint occurs in the transcript showing that Siglin purchased a 1-2 interest instead of a 1-12).

Appellant claims that inasmuch as Sengstacken and Smith have acquired eleven-twelfths of the interest in this property that for that reason appellant should recover all of their said interest on the theory that the transaction was originally fraudulent and that Sengstacken and Smith were participants in said fraud and that the interests which they have since acquired from third parties are subject to the rights and equities of the appellant therein. This contention of the appellant would be good in case there was actual fraud in the original transaction and Sengstacken and Smith had been participants therein, but that is not the case here. As we have stated above, either Sengstacken and Smith purchased this property by an enforceable contract from the appellant and his wife and thereafter re-sold to each of the other parties, in which case all titles are valid and this appellant can recover nothing, or there was no enforceable contract with Sengstacken and Smith and the sale to these several individuals was made by the appellant and his wife through defendant Hall as their agent. And if the latter is the case

then there was a several sale to each of the defendants of a several interest in the property and each of said sales was a valid and subsisting one by reason of the fact that the defendant Hall had no interest therein. Thus, if this theory is good, Sengstacken, Smith or any other one of the original purchasers could have acquired all of the interests in the property, and the only interest which the appellant could now recover would be a one-twenty-fourth interest, or the interest acquired by John F. Hall.

Much ado is also made over certain immaterial discrepancies in the two answers. The difference in the alleged date of the sale was explained by Sengstacken who said that at the time of the first answer he had not found the note of May 17th which was discovered before the second answer was drawn, and refreshed his memory as to the date and amount. The second answer is fuller in some particulars than the first and there may be some slight discrepancies between them; any difference is due to the fact that as the attorneys prepared for trial under the first answer, they became better acquainted with all the facts and were able to draw a fuller and more intelligent answer the second time. Any statements in pleadings drawn by attorneys are entitled to but little weight when opposed to testimony of the parties on the stand subject

to cross examination.

We are here in a Court of equity and come with clean hands and clear consciences. We bought the property in question honestly and in good faith and paid the price the parties asked, and all it was worth, and the appellant by letter declared himself satisfied. Now after several years, during which the property has increased in value from an acreage basis to town-lot basis, the appellant comes before this Court of equity to set aside this eminently fair transaction and deprive innocent purchasers of their rightful properties. As the correspondence shows, this appellant sold most of his deceased wife's property, and now he wishes to raise a technicality and re^{ve}st himself with the property which was fairly sold, and from which sale he has spent the proceeds. We are confident that this Court will never permit any such inequity to be perpetrated, and under the facts and circumstances of this case we claim the benefit of our bona fides and ask that the appellant be strictly held to the burden of proof in law and in fact in establishing the technicalities upon which he would rely.

Respectfully submitted,

C. R. PECK,

C. A. SEHLBREDE

Solicitors for Appellees.

STATE OF OREGON, }
COUNTY OF COOS. }

I, C.R. Peck, hereby certify that I am one of the attorneys of the Appellees in the above entitled cause; that I have carefully compared the foregoing brief of Appellees with the original on file in this case, and the same is a true and correct copy of the whole thereof.

C.R. Peck

Attorney for Appellees.

No. 2371

IN THE
**United States Circuit
Court of Appeals**
NINTH CIRCUIT

CHRISTIAN HERRMANN,
Appellant

vs.

JOHN F. HALL, et al,
Appellees

Appeal from the District Court of the United States
for the District of Oregon

Appellant's Reply Brief

ROBERT J. UPTON,
Fenton Building, Portland, Oregon

ST. RAYNER & ST. RAYNER,
Chamber of Commerce Building, Portland, Oregon
Solicitors for Appellant

No. 2371

IN THE
United States Circuit Court
of Appeals

NINTH CIRCUIT

CHRISTIAN HERRMANN,

Appellant,

vs.

JOHN F. HALL, MARY HALL, his wife, L. D. SMITH, ROSA M. SMITH, his wife, HENRY SENGSTACKEN, AGNES R. SENGSTACKEN, his wife, Z. T. SIGLIN, J. J. CLINKINBEARD, PHILURA CLINKINBEARD, his wife, S. C. ROGERS, DELIA M. ROGERS, his wife, D. L. ROOD, ELLA M. ROOD, his wife, JAMES T. HALL, ALICE HALL, his wife, WILLIAM O. CHRISTENSEN, MATTIE CHRISTENSEN, his wife, TITLE GUARANTEE AND ABSTRACT COMPANY, a corporation, trustee, TITLE GUARANTEE AND ABSTRACT COMPANY, a corporation. EAST MARSHFIELD LAND COMPANY, a corporation, EASTSIDE LAND COMPANY, a corporation, ANDREW MASTERS, CHARLES H. CURTIS, ANNA JOHANSEN, JOHN WALL, MARY PENNOCK, ARTHUR B. SANDOHL, W. R.

HAINES and LOUISE B. HAINES, HARVEY SMITH, GEORGE CLINKINBEARD, ANNA D. CLINKINBEARD, CHAPMAN L. PENNOCK, ARNE P. HUSBY, A. E. CAVANAUGH, M. A. McLAGGEN and MINNIE McLAGGEN, FIRST TRUST AND SAVINGS BANK OF COOS BAY, a corporation, J. W. VINGARD, MARY A. PETERSON, DORIS L. SENGSTACKEN, VICTOR ALTO, L. GRAYCE GOULD, CORNELIUS WOODRUFF, WILLIAM J. LEATON, JOHN F. BANE, A. W. NEAL, A. R. WELCH, WILLIAM VAUGHN, WILLIAM H. PAYNE, HILDA FREDERICKSON, ELIZABETH SCHIEFFELE, ANTHONY STAMBUCK, GEORGE H. ELLIOT, NELLIE CHANDLER, T. V. JOHNSON, LISI ALTO, J. T. HERRETT,

Appellees.

Appeal from the District Court of the United States for the District of Oregon.

APPELLANT'S REPLY BRIEF.

The crucial question in this case is:

Had Hall's agency for the sale and conveyance of the land in question terminated at the time he became interested in the purchase thereof with Sengstacken, Smith, Rogers, Rood and Clinkinbeard?

If his agency had terminated at that time, the sale to the syndicate was valid. If not, it was invalid.

Appellees were bound to concede that Hall entered into an understanding with Sengstacken, whereby it was agreed that Hall was to have a share in the purchasing syndicate and a joint undivided interest in the land, before he executed and delivered the deed thereof, under his power of attorney, to the Title Guarantee & Abstract Company, trustee, on August 31, 1905. Sengstacken himself reluctantly admitted that fact to be true on his cross-examination before the trial court. (T., p. 332.)

Appellees contend, however, that Hall's agency terminated before he conveyed the property to the Title Guarantee & Abstract Company, trustee. They claim:

1. That he entered into a contract, on behalf of appellant and his wife, to sell the land to Sengstacken and Smith, on May 17, 1905, and that his agency ceased at that time.

2. And they further contend that all the other members of the purchasing syndicate are innocent purchasers, etc.

I.

In the first place, as stated in our former brief, appellees have not proved that Hall contracted to sell the land to Sengstacken and Smith, on May 17, 1905, as alleged by them.

Appellees say in their brief (p. 43)

“that defendant Hall as agent for appellant and his wife, on May 17th, 1905, sold the prop-

erty involved to defendants Sengstacken and Smith; that at the time Sengstacken and Smith gave him their joint note for one hundred dollars as part payment on the purchase price, which note is introduced in evidence as 'Defendant's Exhibit BB,' and that Hall then gave Sengstacken and Smith a receipt for said one hundred dollars, specifying the terms of the sale and describing the property. The passing of this receipt and the note was a sufficient memorandum to satisfy the statute of frauds of the state of Oregon, which said statute ^{was} incorrectly set out on page 59 of appellant's brief. * * *

The note shows definitely who the contracting parties are, being payable to John F. Hall, and being signed by Henry Sengstacken and L. D. Smith. The receipt, as testified to by Mr. Sengstacken, contained the 'terms' and described the property. Mr. Sengstacken states the terms were \$4400.00, one-half cash and one-half in one year (T., p. 307). Then (T., p. 308) he further testifies 'That we paid him the note. My recollection is that we took a receipt for \$100.00 on account, describing the land and the terms.' Defendant Hall testifies (T., p. 231):

"Q. Was there any written memorandum made at the time signed by yourself in the nature of a contract or receipt or otherwise, with reference to this transaction?

"A. I made out a receipt for \$100.00 on the purchase price of this particular tract of land."

The unsoundness of appellees' argument must be apparent at a glance.

In the first place, the record shows that the promissory note referred to was not payable to "John F. Hall," as asserted by appellees, but to the firm of "Hall & Hall"—and to no one else. (T., p. 437.) The names of Dora or Christian Herrmann are not mentioned or referred to in any way therein. Sengstacken testified that he himself wrote the words, "Paid by purchase of land. Mrs. Dora Herrmann," across the face of it after he claims to have received it back from Hall. (T., p. 308.) And he also testified that he cut the names of the makers off some time before the date of trial. (T., p. 308.)

And the fact that Sengstacken testified that the receipt "described the property" does not, of course, show what the description set forth in the instrument was, or that it described the land involved in this case.

Also, the fact that Hall testified that he "made out a receipt for \$100.00 on the purchase price of this particular tract of land" does not show what the contents of the receipt were. And what does he mean by "this particular tract of land?" Can the court determine from that what the description contained in the instrument was?

Taking appellees' statements at their face value, however—assume that "the note shows definitely who the contracting parties are;" that the receipt shows that "the terms are \$4400.00, one-half cash and one-half in one year;" and that it "described

the property"—still these facts do not constitute a binding and enforceable contract. It does not appear that the vendors bound themselves to sell and convey or that the vendees obligated themselves to purchase.

Again, it does not appear whether there were any conditions of any kind attached to the sale or not. For anything that appears to the contrary, the agreement might have been optional, one that either of the parties might have performed or refused to perform at will.

Also, it does not appear by the evidence whether the vendors were to convey the fee simple title of the land, or a life estate, or an estate for years, or what. It does not appear whether a deed was to be executed and delivered or not. But assuming that a deed was to be given, it does not appear what kind of a deed—whether a warranty, a bargain and sale, or a mere quitclaim. It does not appear whether the deed was to contain any conditions or covenants of any kind. And it does not appear when the title was to pass—whether upon payment of the first installment of the purchase price, or the last, or when, or at all. Etc.

It must be very apparent, therefore, that appellees have utterly failed to prove their claim, that Hall entered into a valid, binding and enforceable contract, on behalf of appellant and wife, to sell the property in question to Sengstacken and Smith, on May 17, 1905. And their further contention, that Hall's agency terminated at that time, by reason of

that fact, is, therefore, without foundation or merit.

In the case of *Moore vs. Petty*, 135 Fed. 668 (C. C. A., 8th Circuit), the same defense was made as asserted by appellees in the case at bar. In that case, the defendants claimed that they had contracted to sell the property in question to a man by the name of Gray, and that Gray subsequently conveyed his interests to them. The defendants contended that their agency terminated at the time they contracted to sell the land to Gray, and that their subsequent purchase from him was, therefore, valid. Defendants failed to prove, however, that they had entered into a valid, binding and enforceable contract, on behalf of their principals, the plaintiffs, to sell the property to Gray, before they took Gray's place in the purchase. And the court, among other things, said (p. 675):

“It was shown conclusively that the relation of principal and agent between the plaintiffs and the defendants did not cease with the preparation and signing of the contract of sale with Gray. The defendants had expressly agreed that, for the compensation which they were to receive, they would look after the interests of the plaintiffs until the business was concluded and the money fully paid. Moreover, the contract of sale which was signed by them as agents of the plaintiffs contained an unauthorized provision binding the latter to the execution of a warranty deed to Gray. In that condition it was not enforceable against the plaintiffs, nor did Gray at any time before the defendants took

his place in the transaction so obligate himself that the plaintiffs could have held him to the purchase. The latter proceeded with the important condition respecting the character of the deed left unsettled and undetermined by any obligatory writing signed by Gray, down to the time the notes, mortgage and cash payment were sent to plaintiffs, and possibly to the time when, two months later, they struck from the proposed deed the clause of warranty, and executed and returned it to the defendants. But before either of these things were done, Gray, the grantee in the deed, had ceased to have or claim any interest whatever in the property. Before the notes and mortgage were sent to plaintiffs, and before the payment of the purchase price was made, *and whilst the trust relation between the plaintiffs and defendants existed,* Gray came to the latter, and expressed regret at having made the purchase, and a desire to withdraw therefrom. This was an important fact materially affecting the interests of the plaintiffs, and of which they were entitled to be fully and fairly advised by their agents. Whatever of benefit under the circumstances might accrue from the willingness of Gray to abandon the purchase ought not to have been secretly reserved by the agents for their own advantage. They were bound to the utmost good faith, and to the subordination of their own interests to those of their principals. Facts then within the knowledge of the defendants evidenced at least a probability that a higher price could be secured for the land

than Gray was to pay, and the defendants did pay as his successors. *It would not do to draw lines too nicely to aid agents who have, during the existence of their relation of trust and confidence, assumed a position with reference to the business in their charge which is antagonistic to their principals.* What we have said concerning the state of the negotiations when the defendants took the place of Gray in the purchase indicates a clear distinction between the case at bar and that of *Robertson vs. Chapman*, 152 U. S. 673, 14 Sup. Ct. 741, 38 L. Ed. 592, upon which reliance is placed."

Appellees further say (brief, p. 44) that

"this evidence of the receipt, both on the part of Sengstacken and Hall, was not objected to at the time of the trial nor was there any motion thereafter interposed to strike the same out, and now, for the first time, on appeal an objection is made that this is incompetent and insufficient to establish the contents of said receipt."

Appellant not only contends that appellees have not proved the contents of the alleged receipt by "competent" evidence, but he contends that they have not proved it by *any* evidence, competent or otherwise.

And furthermore, appellees' statement, that no objection was made to the introduction of "this evidence of the receipt, both on the part of Sengstacken

and Hall," at the time of the trial in the court below is untrue.

The record shows that Hall was first called by appellees, that he testified as follows, and that the following objections were made to his testimony, to-wit (T., p. 229 et seq.) :

Q. When were the final negotiations instituted resulting in this transfer?

A. It was in May, 1905.

Q. For the purpose of refreshing your memory as to dates, I hand you a promissory note taken from the possession of Henry Sengstacken, dated Marshfield, May 17, 1905, for \$100, payable to the order of Hall & Hall, and ask you to examine that and then state, if you can when the first negotiations were made resulting in the sale of this property.

A. Well, the negotiations probably a few days before this letter—before this note was made, but on this date we closed the deal; I sold the property, agreed to sell it to Sengstacken and Smith.

Mr. St. Rayner: *Wait a minute; excuse me, I would like to know if there was any written agreement.*

Court: *Ask him that.*

Mr. St. Rayner: *I object to any oral testi-*

mony being given of the nature of the sale of this property.

Court: *He is not proving title, he is proving when negotiations began. This doesn't prove title, of course.*

Q. Do you recognize this note?

A. I recognize this note except this handwriting there; that wasn't made that day, but the note itself, I recognize the note as being—

Court: What date is that?

A. May 17th, 1905.

Q. That is, the handwriting across the face, "Paid by purchase of land, Mrs. Dora Herrmann." You don't recognize that?

A. No, I don't recognize that, no.

Q. Well, where did you ever see that note before?

A. That note was given to me by Mr. Smith and Mr. Sengstacken on May 17th, 1905.

Q. For what purpose?

A. On the purchase price of the Herrmann claim—Holcomb claim.

Q. At what price?

A. \$4400.

Q. Was this note signed and by whom?

A. Henry Sengstacken and L. D. Smith.

Mr. Peck: We offer the same in evidence.

Mr. St. Rayner: We object on the ground that it is incompetent.

Court: The objection will be overruled and it will be put in the record.

Note marked "Defendant's Exhibit BB." (Which is hereto attached and made a part hereof.)

Q. Was there any written memorandum made at the time, signed by yourself, in the nature of a contract or receipt, or otherwise, with reference to this transaction?

A. I made out a receipt for \$100 on the purchase price of this particular tract of land.

Q. Where is that receipt?

A. I gave it to Mr. Sengstacken; I haven't seen it since.

Q. Did he surrender it to you when the transaction was finally consummated?

A. He did not.

Q. Have you made a search for that paper?

A. I looked over my office and haven't got it there, and I don't have any recollection of his ever returning it to me; I don't think he did. In fact I am positive it wasn't returned.

Q. *Were there any conditions attached to this sale of any nature?*

Mr. St. Rayner: *I object to any testimony of an oral nature.*

Court: I haven't seen the bill of complaint in this case, but I understand you are charging actual fraud; you are charging that this land was purchased by these people by actual fraud.

Mr. St. Rayner: We charge that they pretended to purchase the land the 30th of August, 1905.

Court: This you charge was a fraudulent transaction?

Mr. St. Rayner: We also charge it as a fraudulent transaction, between a fiduciary agent—between a principal and agent. The agent reserving at the time of sale—

Court: You base your right to recover in this case solely on the fact that Hall was the agent of Mrs. Herrmann?

Mr. St. Rayner: No, that is only one of the grounds.

Court: The other ground is the actual fraud?

Mr. St. Rayner: The other ground is the actual fraud.

Court: Very well, then it is quite important

that we should know all the facts, and this evidence is perfectly competent if *that* is the charge.

Mr. St. Rayner: *What we object to in this, however, is for the defendant attempting to prove by oral testimony that there was an oral agreement between Mr. Hall, as the attorney in fact of Mr. and Mrs. Herrmann, and Mr. Sengstacken and Mr. Smith, in selling this property. It is in contravention of the statute.*

Court: *Certainly it probably would not amount to a legal contract, but as a fact in this case, as it bears on the question of fraud, and for that purpose it is competent.*

Mr. Peck: *I will withdraw the question.*

And Sengstacken testified as follows (T., p. 307 et seq.):

Q. Now, relate in your manner, the circumstances and facts surrounding the initiation and consummation of this sale of the Norman tract to yourself and associates.

A. * * * I met Ren Smith in town one day. * * * So he and I went up to Judge Hall's office, and ascertained what he would sell it for, on terms of half down and half on time. He said he would take \$4400, so we agreed to take it on the terms of half cash and half in one year, interest six per cent; and we at that time gave him our joint note, payable ten days after date for \$100, as part payment of the land.

Q. Is Defendant's Exhibit BB that note?

A. Yes, sir, that is the note.

Q. Did you make out that note?

A. I made that note out.

Q. And did you put the endorsement across the face here, "Paid by purchase of land. Mrs. Dora Herrmann"?

A. I did that when it was redeemed, yes.

Q. On August 30, 1905, did you make that endorsement?

A. Yes, when I got the note back. I don't know the exact date.

Q. Did you cut the signature off that date.

A. I did. That is the way I generally cancel my notes; cut the name off.

Q. Whose names were signed to that note before you cut them off?

A. Henry Sengstacken and L. D. Smith.

Q. *Now proceed with your testimony.*

A. *When we paid him the note, my recollection is that we took a receipt for \$100 on account, describing the land and the terms,*
* * *

Q. Where is the receipt which was given you by John F. Hall on May 17, 1905?

A. I don't know. I have been looking for it, but I have been unable to find it. * * * It is possible it may have been destroyed, and it is possible I may have it yet among my papers. At any rate I haven't been able to locate it.

Q. Have you made a careful search for it?

A. I made quite a search.

Thus it appears that there is not a word in the testimony of either Hall or Sengstacken showing the contents of the alleged memorandum-receipt.

The record shows that there were only two instances where Hall even attempted to state the contents of the missing contract. And appellant objected both times.

First, counsel for appellees asked him when negotiations were instituted resulting in the sale of the property. (T., p. 229.) In reply to that question, the witness stated when negotiations were commenced, and then volunteered the following: "but on this date (May 17, 1905) we closed the deal; I sold the property, agreed to sell it to Sengstacken and Smith." (T., p. 229-30.) Counsel for appellant objected. (T., p. 230.) And the court held: "He is not proving title, but he is proving *when negotiations began. This doesn't prove title, of course.*" (T., p. 230.) The witness was then permitted to proceed with his testimony concerning the preliminary negotiations:

The second instance in which counsel for ap-

pellees attempted to prove the contract by this witness' testimony occurred when he asked him the following question: "Q. Were there any conditions attached to this sale of any nature?" (T., p. 231-2.) Counsel for appellant objected. (T., p. 232-3.) And the court held that this evidence "*certainly would not amount to a legal contract,*" but as a fact in the case, as it bears on the question of *fraud*, and for *that* purpose, it is competent." (T., p. 233.) And after the court ruled that oral testimony was not admissible for the purpose of proving the contract, but that it might be received for what it was worth for the purpose of refuting the charge of fraud in the bill of complaint, counsel for appellees withdrew the question (T., p. 233), and did not further interrogate the witness on the subject.

And Sengstacken's testimony is practically a repetition of Hall's. After rehearsing Hall's story regarding the preliminary negotiations they claimed to have had for the sale and purchase of the land, he then testified (T., p. 308): "Q. Now proceed with your testimony. A. When we paid him the note, my recollection is that we took a receipt for \$100 on account, describing the land and the terms." And after having thus testified that Hall gave him a receipt setting forth the terms of their alleged agreement, the witness, instead of stating the language of the receipt or the substance of its provisions, branched off into a discussion of other matters, and did not even attempt to give the contents of the instrument. There was, therefore, no occasion or necessity for appellant to object to his testimony on that point.

And the record further shows that, although the trial court ruled that Hall's testimony was not admissible for the purpose of proving the alleged contract, and although no further evidence was offered by appellees showing the contents of the alleged memorandum, yet, nevertheless, the court, in its opinion, held (T., p. 85) that, "Here the sale was *virtually* made by Hall to Sengstacken and Smith in May, 1905. At that time it is admitted that he had no interest either immediate or prospective in the property and no idea that he would ever acquire one. His duty to his principal ceased at the time of the contract with Sengstacken and Smith, as far as the fact of the sale was concerned. Thereafter there was no conflict between his duty to his principal and self interest in that regard."

We submit that the trial court having expressly ruled that Hall's testimony was admissible merely for the purpose of showing "when negotiations began" and to refute the charge of "fraud," and that it was not admissible for the purpose of proving the "contract," that appellant was entitled to rely upon its effect being similarly limited, both in the court below and on appeal. It is manifest that any other rule would lead to surprise and injustice.

Barasch vs. Kramer, 115 N. Y. Supp. 176.

Schmit vs. Schweitzer, 137 N. Y. Supp. 807, 808.

Henry vs. Everts, 29 Cal. 610, 612.

And the rule is elementary that where objection is once made to the introduction of evidence, and

the court passes upon the objection, that it is not necessary to repeat the same objection to the same class of evidence.

Salt Lake City vs. Smith, 104 Fed, 457, 470.

And this is so even though another witness attempts to testify regarding the same matter.

Cin. etc. Ry. vs. Bennett, 134 Ky. 19.

Schierbaum vs. Schamme, 157 Mo. 1.

Louisville etc. Ry. vs. Garver, 85 Tenn. 465.

Appellees further say (brief, p. 48) that

“Appellant should not in this suit be permitted to raise the question whether the contract was a verbal or a written one; the defense of the statute of frauds is never available in a collateral proceeding,” etc.

The question of the contract is not collaterally involved in this case; it is directly in issue. Appellees themselves expressly pleaded it as an affirmative defense in their answer (par. XXVII, 1, T., p. 65) and it was denied in the reply (par. XXIII, T., p. 79). Indeed, it is the very foundation of appellees' defense herein. They themselves tendered it as an issue in the case, for the purpose of showing that Hall's agency terminated on May 17, 1905, before he acquired an interest in the land he was authorized to sell; and they are, therefore, bound to prove a valid, binding contract under the law. Otherwise, their defense must fall.

And appellees further say (brief, p. 53), that:

“From every viewpoint we are squarely within the Robertson vs. Chapman case and entitled to the application of the law in that case.”

The Robertson vs. Chapman case and the case at bar are in no way similar.

In that case it was not held, or even contended, as contended by the appellees herein, that an agent could purchase the property entrusted to him for sale after he had entered into a mere agreement to sell it and before the contract had been executed. The complainant, Robertson, charged that his agent, “Polk bought in the name of O’Donohoe.” The court, however, found that this charge was unsupported by the evidence.

And the agency under which Polk was acting in that case was not the same as Hall’s agency in the case at bar. Polk was not employed and authorized to sell and convey the property involved in that case, under a general power of attorney, giving him power to fix the terms of sale, execute deeds, notes, mortgages, etc., as was Hall in this case. Polk was merely directed by Robertson to accept an offer, on his behalf, that had been made by O’Donohoe to purchase the land, and to deliver the title papers, which the parties themselves executed. And the evidence shows that Polk fully performed all the acts he was authorized by Robertson to perform in effecting the sale before he acquired any interest in the property. He accepted O’Donohoe’s offer for Robertson, and delivered O’Donohoe’s notes and mortgage on the

land for the deferred payments of the purchase price to Robertson. Robertson accepted O'Donohoe's notes and mortgages, and executed a deed of the premises, and sent it to Polk, with instructions to deliver it to O'Donohoe, whenever the latter paid the \$1000.00 cash due on the purchase price. Some time thereafter Polk bought the property from O'Donohoe. And two years later Robertson instituted suit to recover the same, charging that "the original purchase in the name of O'Donohoe was a mere device upon the part of Polk, in violation of his duty as the plaintiff's attorney and agent, to get the property at less than its value, concealing from the plaintiff, all the while before the conveyance to O'Donohoe, the fact that he, Polk, bought in the name of O'Donohoe." The court found, however, that the evidence did not support the charge made in the bill of complaint, but that the sale by Robertson to O'Donohoe, through the agency of Polk, was in every sense a bona fide sale to O'Donohoe, and that Polk was not interested therein; that the sale to O'Donohoe had been executed before Polk agreed to purchase the property from the latter; and that at the time Polk acquired the land from O'Donohoe, the agency under which Polk was acting had terminated. The court said:

"The sale to O'Donohoe was so far consummated that neither party was at liberty to undo what had been done. O'Donohoe executed his notes for the deferred payments, and, his wife uniting with him, gave a mortgage to secure them. The notes and mortgage were delivered to and accepted by the plaintiff, who executed

a deed to O'Donohoe, and placed it in the hands of Polk, to be delivered to O'Donohoe, whenever a decree for the sale of the property was obtained (the court states previously in its opinion that it was decided that the trustee, Robertson, had authority under the will to convey the property, and that a decree of the court authorizing him to sell was, therefore, unnecessary, p. 677), and upon the payment of the \$1000.00 stipulated to be paid in cash. So that at the time Polk took the property from O'Donohoe, it was not in the power either of the plaintiff or of O'Donohoe to rescind the contract between themselves, and Polk's agency for the sale of the property had, in every material sense, terminated. * * * A real bona fide sale of the property, through the agency of Polk, and upon the terms prescribed by the plaintiff, and which sale was substantially completed between vendor and vendee, intervened between Polk's acceptance of the position of agent and his purchase of the property from the plaintiff's vendee * * * his (Robertson's) present complaint * * * is that Polk, his agent to sell, while pretending to have sold to O'Donohoe, had, without his knowledge or assent, taken the property for himself, in the name of O'Donohoe, and that he did not become aware of that fact until August, 1888. If this complaint were well founded, the plaintiff, according to the principles to which we have referred to, and which are deeply rooted in the law, would be entitled to a decree that would deprive Polk of

the fruits of his infidelity. But, as already suggested, the evidence does not justify the conclusion that O'Donohoe's purchase was, in fact, for the benefit of Polk."

Thus it appears that Polk purchased from O'Donohoe after the agency under which he was acting had terminated, and after the title of the property had passed from Robertson to O'Donohoe.

Appellees herein assert that "the legal title had not passed to O'Donohoe, the deed therefor was in the hands of the agent awaiting the completion of payments by O'Donohoe" at the time Polk acquired the property from O'Donohoe.

As a matter of fact, it does not appear when Polk delivered Robertson's deed to O'Donohoe. The fact of the delivery of the deed in that case, however, was of minor importance. O'Donohoe and his wife executed and delivered their notes and mortgage on the land and delivered the same to Robertson, and he received and accepted them, long before Polk traded O'Donohoe out of the property. By accepting O'Donohoe's mortgage on the property Robertson thereby expressly acknowledged that the title had passed to and vested in Donohoe. See:

Balfour vs. Hopkins, 93 Fed. (9th Circuit) 569.

Willison vs. Watkins, 3 Pet. (U. S.) 48.

Kelly vs. Stanberry, 13 Ohio 408.

Conklin vs. Smith, 7 Ind. 108.

Voss vs. Ella, 106 Ind. 260.

The facts in the case at bar, however, are very different from the facts in the Robertson vs. Chapman case.

In this case, Hall was not authorized merely to accept an offer for the purchase of the land in question for appellant and his wife, but he was employed and empowered to both sell and convey the same, under a general power of attorney (T., p. 31-33), giving him authority to enter into agreements, fix the terms of sale and

“to sign, seal, execute, deliver and acknowledge such deeds, covenants, indentures, agreements, mortgages, * * * bonds, notes, receipts, evidences of debt, releases and satisfaction of mortgages, * * * and other instruments in writing of whatever kind and nature.”

And the record herein shows beyond any dispute that *before* Hall executed and delivered the deed conveying the land in question to the Title Guarantee & Abstract Company, trustee, on August 31, 1905, and *before* that company executed and delivered its note and mortgage to him for the deferred payments of the purchase price, that he (Hall) had an understanding with Sengstacken, whereby it was agreed that he was to have a share in the purchasing syndicate and a joint undivided interest in the land. Henry Sengstacken himself admitted these facts to be true on his cross-examination before the trial court. He testified (T., p. 332):

Q. Well, *after* you had agreed with him (Hall), or he had agreed with his brother, and

announced to you that he and his brother would take the one-twelfth, *then you closed the transaction, and executed the deed and mortgage.* Is that true?

A. *Yes, I guess that is correct.*

And Hall did not purchase from his principals' grantees; he purchased *with* them; he acquired his interest at the same time they acquired theirs, in the same transaction, and under and by virtue of the same deed of conveyance, and he himself paid part of the purchase price to his principals. "A real bona fide sale of the property" did not "intervene" between the time Hall accepted the position of agent and the time he purchased an interest in the land; the title passed directly from Mr. and Mrs. Herrmann to the Title Guarantee & Abstract Company, in trust for Hall and his associates.

The best proof that Hall's agency had not terminated before he had the understanding with Sengstacken, whereby it was agreed that he was to have a share of the property, is the fact that he performed other acts on behalf of appellant and his wife in effecting the sale *after* that time. If his agency had terminated at the time contended by appellees, then what right had Hall to thereafter execute and deliver a deed of the premises to the Title Guarantee & Abstract Company, in the names of his principals? What right had he thereafter to embody in the deed all of the mineral rights, coal beds, water-front, tide-lands and the other valuable easements and rights-of-way to the navigable waters

of Isthmus Slough running into Coos Bay over Lot 3—an entirely different tract to the “Holcomb” tract—which require nearly four pages of the printed Transcript herein to describe (T., p. 34-37)? What right had he thereafter to convey all of the rights in the deed under general covenants of warranty and seisin and against encumbrances in the names of his principals? What right had he thereafter to accept the purchase price of the land and the note and mortgage of the Title Guarantee & Abstract Company, trustee, for the deferred payments, in the names of his principals? If Hall’s agency terminated when appellees claim that it did, then we submit that his subsequent conveyance to the Title Guarantee & Abstract Company, trustee, was void, for the reason that he was without power or authority to make the same.

No court has ever held, where an agent has been authorized to both sell and convey the property of his principals, as Hall was in this case, that such an agency would terminate before the agent had actually sold and conveyed the property. To say that an agency has terminated before the agent has performed the acts he has been employed to perform would be absurd. In *Wing & Evans vs. Hartup*, 122 Fed. 897, a case which even appellees were forced to concede is directly in point herein, the court holds in unmistakeable terms that such an agency does not terminate, and that such an agent cannot speculate with the subject-matter of his agency, until after the property has been sold and conveyed and the legal title thereof has passed from his principal. The court said (p. 902):

“It is a working rule that is needed—one that is convenient and safe to apply—and, after much consideration, we think the test that has been indicated, namely, whether the legal title has or has not passed, should determine what action a court of equity must take when it appears that a trustee has re-purchased an interest in the trust estate from the person to whom the interest has been sold. *If the legal title has not yet left the trustee, the contract between the parties having dealt with the equitable title only, the transaction is voidable at the option of the cestui que trust, without inquiry into its good path.*”

A relaxation of the rule thus stated would open wide the door for the perpetration of all the evils which the rule was intended to prevent.

Appellees further say (brief, p. 56) that

“The appellant contends that the sale should be set aside as to all the original purchasers on the theory that they were co-purchasers with Hall and that his constructive fraud tainted the whole transaction.

“For the purpose of argument we will admit that if Hall agreed from the beginning of the negotiations to take a joint interest with the other purchasers and they had knowledge of the fact, then and in that event, the sale could be set aside in its entirety. That is the rule of law laid down in the cases cited by appellant

and is a most salutary principle.”

“But the facts in this case differ from the facts of every other case cited by appellant. These defendants were not co-purchasers from the beginning of negotiations, nor were they joint purchasers at any stage of the transaction.”

It is immaterial whether Hall “agreed from the beginning of negotiations” to take his interest with the other purchasers. He agreed to take his interest before he sold and conveyed the land. The sale, therefore, should be set aside.

Keith vs. Kellams, 35 Fed. 243, 247.

And appellees’ assertion, that “these defendants were not co-purchasers * * * nor were they joint purchasers at any stage of the transaction,” is, to say the least, highly absurd. Appellees show by their own evidence that “these defendants” bought the land as a whole, that they purchased it together, that their interests were undivided, that they acquired their interests at the same time, in the same transaction, and under and in virtue of the same deed of conveyance. How then can counsel for appellees seriously assert that they were not co-purchasers?

And an examination of appellees’ brief shows that they have not even attempted to meet or answer appellant’s contention, that all of the members of the purchasing syndicate were impressed with constructive notice of Hall’s purchase, etc. (See ap-

pellant's original brief, pages 108 et seq.)

Appellees further say (brief, p. 62) that

“There was no reason why said defendants should suspect that Hall was not reporting the facts of his purchase to his principal, and if anyone should suffer, it should not be the innocent parties.”

Where an agent has violated his trust, as Hall did in this case, the presumption is not that he has communicated the fact to his principals, but the presumption is to the contrary.

Mechem on Agency, Sec. 723.

I. Clark & Skyles on Agency, Sec. 485.

Appellees assert that, although the court should find that Hall purchased his interest before his agency terminated, the appellant cannot recover the land, because all of the appellees, except Hall, are bona fide purchasers.

If Hall violated his trust, how can Sengstacken and Smith be innocent purchasers, when, as defendants allege and show themselves, that they negotiated the transaction and entered into the agreement with him under which he procured his interest with them?

Appellees have not attempted to meet or answer the points and authorities set forth in appellants' original brief, showing that all of the parties to the transaction are impressed with constructive or presumptive notice of Hall's acquisition of his interest

in the land. (Appellants' brief, p. 108 *et seq.*)

Appellees must concede, under the authorities cited, that if Hall conveyed the property in violation of his trust, that his principal may follow it into the hands of anyone who is not an innocent purchaser.

Oliver vs. Pratt, 3 How. (U. S.) 401.

The claim of being a bona fide purchaser is available only when alleged as an affirmative defense by plea or answer.

Boone vs. Chiles, 10 Pet. 177.

Appellees have not, in their answer, alleged any facts to support the defense or plea that they are innocent purchasers. On the contrary, they expressly alleged, and the evidence shows, that they paid only one-half of the stipulated purchase price, and gave a mortgage back to secure the other half. (Answer, T., p. 62-63.) And the appellees all admitted in their testimony that they had actual notice shortly after the delivery of the deed that Hall had acquired his interest in the land with them. And it is also admitted that the mortgage was not paid at the time they were notified of that fact.

The rule is well settled that to constitute a bona fide purchaser all of the purchase money must have been paid before notice of the equities or rights of the owner. It is not sufficient to show that part was paid and part secured by a mortgage on the land.

Balfour vs. Hopkins, 93 Fed. 570.

Villa vs. Rodriguez, 12 Wall. 338.

Wormley vs. Wormley, 8 Wheat. 421.

Wood vs. Rayburn, 18 Or. 4, 20.

Lewis vs. Phillips, 17 Ind. 108, 113.

Dugan vs. Vattier, 3 Balckf. 245.

Appellees also assert that, although the court should hold that Hall purchased his interest before his agency terminated, that the interests purchased by Clinkinbeard, Rogers and Rood, which Sengstacken and Smith afterwards purchased from them, cannot be set aside, on the ground that these parties were innocent purchasers. Counsel for appellees assert this on the ground that where the owner has been illegally deprived of his property, if it reaches the hands of an innocent purchaser, although it may be conveyed by him afterwards to a party with notice of the illegal transaction, that the rights of the owner are cut off. We concede that is the general rule in cases where it is applicable. But the exception to the rule stated applies here. Sengstacken and Smith have purchased and now claim to own these interests, and they are the original parties who negotiated the deal and induced Hall to violate his trust. The rule in such cases is well settled that when the title passes to an innocent purchaser, if it afterwards reverts in the original party to the illegal transaction, all the equitable rights of the owner reattach to it in his hands. See cases in appellant's original brief, page 114.

It is therefore apparent that none of the appellees are innocent purchasers of this property in any aspect of the case.

Respectfully submitted,

ROBERT J. UPTON.

ST. RAYNER & ST. RAYNER,
Solicitors for Appellant.

No. 2371

IN THE

**United States Circuit
Court of Appeals**

NINTH CIRCUIT

CHRISTIAN HERRMANN,
Appellant

vs.

JOHN F. HALL, et al,
Appellees

Appeal from the District Court of the United States
for the District of Oregon

PETITION FOR A RE-HEARING

Filed

ROBERT J. UPTON,
Fenton Building, Portland, Oregon

DEC - 4 1914

ST. RAYNER & ST. RAYNER,
Chamber of Commerce Building, Portland, Oregon
Solicitors for Appellant

IN THE
United States Circuit Court
of Appeals
NINTH CIRCUIT

CHRISTIAN HERRMANN,

Appellant,

vs.

JOHN F. HALL, MARY HALL, his wife, L. D. SMITH, ROSA M. SMITH, his wife, HENRY SENGSTACKEN, AGNES R. SENGSTACKEN, his wife, Z. T. SIGLIN, J. J. CLINKINBEARD, PHILURA CLINKENBEARD, his wife, S. C. ROGERS, DELIA M. ROGERS, his wife, D. L. ROOD, ELLA M. ROOD, his wife, JAMES T. HALL, ALICE HALL, his wife, WILLIAM O. CHRISTENSEN, MATTIE CHRISTENSEN, his wife, TITLE GUARANTEE AND ABSTRACT COMPANY, a corporation, trustee, TITLE GUARANTEE AND ABSTRACT COMPANY, a corporation, EAST MARSHFIELD LAND COMPANY, a corporation, EASTSIDE LAND COMPANY, a corporation, ANDREW MASTERS, CHARLES H. CURTIS, ANNA JOHANSEN, JOHN WALL, MARY PENNOCK, ARTHUR B. SANDOHL, W. R.

HAINES and LOUISE B. HAINES, HARVEY SMITH, GEORGE CLINKENBEARD, ANNA D. CLINKINBEARD, CHAPMAN L. PENNOCK, ARNE P. HUSBY, A. E. CAVANAUGH, M. A. McLAGGEN and MINNIE McLAGGEN, FIRST TRUST AND SAVINGS BANK OF COOS BAY, a corporation, J. W. VINGARD, MARY A. PETERSON, DORIS L. SENGSTACKEN, VICTOR ALTO, L. GRAYCE GOULD, CORNELIUS WOODRUFF, WILLIAM J. LEATON, JOHN F. BANE, A. W. NEAL, A. R. WELCH, WILLIAM VAUGHN, WILLIAM H. PAYNE, HILDA FREDERICKSON, ELIZABETH SCHIEFFELE, ANTHONY STAMBUCK, GEORGE H. ELLIOT, NELLIE CHANDLER, T. V. JOHNSON, LISI ALTO, J. T. HERRETT,

Appellees.

Appeal from the District Court of the United States for the District of Oregon.

PETITION FOR A RE-HEARING

Now comes the above named appellant, Christian Herrmann, and respectfully petitions the court to re-consider its opinion in the above entitled suit, and for a re-hearing of said cause, for the following reasons:

The court holds that the appellee, John F. Hall, did not violate his duty as agent in acquiring an interest in the land in question, which appellant and his wife had authorized and empowered him to sell

and convey for them, and, hence, that the conveyance of August 31st, 1905, to the Title Guarantee & Abstract Company, in trust for the benefit of said Hall and his associates in the transaction, was a valid sale.

This holding is based upon the ground that "the property was sold outright to Sengstacken and Smith without any restrictions or conditions" on the 17th of May, 1905, and that, therefore, "the sale was consummated as we have shown, on the 17th of May, 1905, and nothing then stood in the way of his (Hall's) agreeing three months thereafter to purchase an interest in the property."

We respectfully submit that the court's holding is erroneous, for two reasons:

I.

There is no evidence in the case showing that "the property was sold **outright** to Sengstacken and Smith **without any restrictions or conditions**" on the 17th day of May, 1905, as recited in the opinion.

The evidence does not show whether the alleged contract was conditional or not. The record is silent on this very important question. The appellees failed to offer any proof to show that their alleged contract was not subject to any conditions.

The court is therefore mistaken in assuming that the land was sold "outright" to Sengstacken and Smith on May 17th, and that the contract was one that "could have been enforced by either the vendor

or vendees," "and that Hall's duty as agent for the sale and conveyance of the premises thereupon and thereby terminated.

It is manifest that unless it be shown, not only what the terms of the alleged contract were, **but also that it contained no conditions** (or if it contained conditions—what they were), that it would be impossible to say that the alleged contract was mutually binding—one that could be enforced by either the vendor or the vendee.

It follows, therefore, that Hall's agency did not terminate on the 17th of May, as contended by appellees, and that the conveyance to the Title Guarantee & Abstract Company, in trust for Hall and his associates, on the 31st of August, 1905, was a violation of Hall's duty as agent and should be set aside.

Moore vs. Petty, 135 Fed. 663 (C. C. A. 8th Circuit).

II.

Assuming, however, that the evidence showed that the alleged agreement of May 17th was a valid, binding and unconditional contract, yet, at most, it was but a mere **executory** contract at the time it was understood between Sengstacken and Hall that Hall was to have a share in the property. The contract was not **executed** until August 31st, 1905. And it is conceded that it was understood that Hall was to have a share in the land **before** that time.

Under these circumstances, it would be immaterial, as a matter of law, whether Hall contracted to sell the property to Sengstacken and Smith on the 17th of May or not; that fact, even if established, would not constitute a defense.

The rule is well settled, where an agent has been authorized and empowered to sell and convey property, as in this case, that such an agent's duty does not terminate when he has entered into a mere **executory** contract of sale; it does not cease until the contract has been **executed** and the title of the property passed to the vendee. And if the agent, after having entered into an executory contract of sale on behalf of his principal, has any understanding with the prospective vendee before such contract has been **executed**, the transaction is absolutely void at the mere option of the principal.

This is the rule of law laid down by the courts both of this country and of England, and there is not a decision to the contrary that we have been able to find after a most diligent search.

Wing & Evans vs. Hartupee, 122 Fed. 897.

Cook vs. Berlin Woolen Mills, 43 Wis. 433.

Parker vs. McKenna, L. R. 10 Ch. App. p. 96.

ROBERT J. UPTON,
ST. RAYNER & ST. RAYNER,
Solicitors for Appellant.

United States of America,)
 District of Oregon,) ss.

I, Robert J. Upton, being first duly sworn, depose and say that I am one of the Solicitors in Chancery and of counsel for appellant, Christian Herrmann, herein, and I do hereby certify that in my judgment the within Petition for Re-hearing is well founded and that said Petition for Re-hearing is not interposed for delay.

ROBERT J. UPTON,

Subscribed and sworn to before me this 2nd day of December, 1914.

(Seal) E. M. HALL,
 Notary Public for Oregon.



